IN THE

Supreme Court of the United States

October Term, 1975

No. 75-733

LONG ISLAND LIGHTING COMPANY,
Petitioner,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ASA D. SOKOLOW
Attorney for Petitioners
Long Island Lighting Company and Consolidated Edison Company of New York, Inc.
575 Madison Avenue
New York, N. Y. 10022

Of Counsel:
DAVID W. COHEN,
PAUL E. LEVINE,
Rosenman Colin Kaye Petschek
Freund & Emil
575 Madison Avenue
New York, N. Y. 10022

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STATEMENT

Petitioners LONG ISLAND LIGHTING COMPANY ("LILCO") and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. ("CON EDISON") respectfully pray that a Writ of Certiorari be issued to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto as Exhibit A. The opinion of the District Court is reported at 390 F. Supp 1172, and appears in the appendix as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 22, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the District Court and Court of Appeals on motions pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure improperly granted summary judgment on the merits of petitioners' antitrust claims by dismissing them for lack of standing to sue under Section 4 of the Clayton Act?

II. Whether the conflict among the circuits on rules for determining who has standing to sue for antitrust violations should be resolved?

III. Whether the Second Circuit's "target area" standing test contradicts the settled construction of the antitrust laws established by this Court?

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 1, 2, 15 and 26, which are set forth in the Appendix as Exhibit E, and Federal Rules of Civil Procedure 12 and 56, set forth in the Appendix as Exhibit F.

STATEMENT OF THE CASE

A. Preliminary

These are antitrust actions for treble damages and injunctive relief brought by two East Coast public utilities, LILCO and CON EDISON, against three major integrated oil companies and two of their subsidiaries: Standard Oil Company of California ("SOCAL") and its wholly-owned subsidiary, Chevron Oil Trading Company; Texaco Inc. ("TEXACO") and its wholly-owned subsidiary, Texaco Overseas Petroleum Company; and Mobil Oil Corporation ("MOBIL"). The complaints appear in the Appendix as Exhibits C and D.

The first claim for relief of each complaint seeks damages incurred and injunctive relief as a result of a joint and illegal attempt to stop the flow of Libyan low sulphur oil to the United States, constituting an unlawful boycott. After the boycott, the utilities obtain reduced quantities of replacement oil at a greatly increased price and on terms distinctly less favorable than prior to the boycott, and the first claims seek these and other damages, in the case of LILCO, $186,000,000 and for CON EDISON, $156,000,000. These claims were dismissed below and that dismissal and its affirmance precipitate this petition.

The LILCO complaint also sets forth a second claim for relief, which seeks damages resulting from the oil companies' conspiracy to monopolize and monopolization of the market for the production and sale of low sulphur crude oil and its products in the East Coast of the United States. The District Court dismissed this claim as well, but the Court of Appeals reversed this part of the District Court's decision and reinstated LILCO's second claim.

B. The First Claims For Relief

The boycott which is the subject of the first claims for relief was an outgrowth of unlawful activity commenced by the major oil companies in January, 1971 with the formation of the London Policy Group ("LPG"), a non-public organization of the international oil cartel. Its members were the so-called "majors," including respondents, and a number of "independent" oil companies. It was formed ostensibly to enable its members jointly to plan policy with respect to and to negotiate with members of the Organization of Petroleum Exporting Countries ("OPEC"). In operation, however, the LPG's activities ranged far beyond these limited purposes.*

Documents uncovered in the most preliminary discovery show that from its inception the LPG functioned as a vehicle for the major oil companies to control the price and supply of petroleum and petroleum-related products in the free world, including Libyan low sulphur oil. Using these documents, LILCO and CON EDISON sought to demonstrate to the courts below that the boycott described in the complaints was part of a much larger conspiracy affecting the price and supplies of oil to the free world, a conspiracy which is the subject of the second claim for relief of the LILCO complaint. These documents confirm that the boycott was proposed by SOCAL and expressly agreed to by MOBIL, TEXACO and the other major LPG members. The boycott was then planned and implemented by the LPG, and orchestrated through its extensive communications network.

*In a series of Business Review Letters, the Department of Justice gave limited sanction to joint *negotiation* with host country governments by LPG members. It later cautioned the oil companies in a letter, dated October 5, 1973, which expressly condemned the precise activities which are the subject of the first claims for relief in these actions:

> "Last, let me stress that our non-disapproval is in no way intended to sanction or authorize any *joint oil company action which tends to reduce the supply of petroleum to the United States, such as . . . joint agreements among oil companies to halt production or cease lifting oil in any country, to boycott oil from any country, or to chase so-called 'hot oil'.*" (emphasis added).

The effect it would have on the utilities was well understood. The utilities were required by environmental regulations to burn low sulphur oil and there was no effective substitute for it. Immediately prior to the boycott, the supply of low sulphur oil became critically low. Libya had become the only available source of low sulphur oil to the utilities. Indeed, as the oil companies were expressly warned, if the utilities were denied supply of this particular grade of oil, blackouts and brownouts to the millions of customers in their service areas would be imminent.

The particular low sulphur oil used by LILCO and CON EDISON had come from a field in Libya operated jointly, pursuant to a concession, by SOCAL and TEXACO. Prior to the boycott, SOCAL distributed substantially all of its share of oil produced from the concession through the New England Petroleum Company ("NEPCO"), a refiner-wholesaler. SOCAL delivered the oil in its tankers to a refinery in the Bahamas, owned jointly by SOCAL and NEPCO, where it was refined and delivered by NEPCO to LILCO and CON EDISON.

LILCO and CON EDISON received the oil under long term supply agreements with NEPCO. In the year prior to the filing of these complaints, LILCO and CON EDISON purchased approximately twenty million barrels of this low sulphur oil.

LILCO and CON EDISON had been induced to enter into the long term supply agreements with NEPCO on the express representation of SOCAL that it would stand behind and support NEPCO and guarantee supplies of this oil for the duration of the agreements. The effect of these agreements, whose existence was common knowledge in the petroleum industry, was to make SOCAL's and TEXACO's Libyan concession a major source of supply for the East Coast of the United States. At the time of the boycott, when low sulphur oil was in extremely short supply, it had become, as a practical matter, the only available source.

Under established Libyan law, the crude oil under Libyan soil was owned by Libya, and the oil companies' concessions constituted contractual rights permitting them to produce and market the oil. The event which ostensibly precipitated the illegal group boycott was the announcement by the Libyan government on September 1, 1973 demanding a 51% participation in the contractual holdings in Libya of foreign oil companies, including the holdings of SOCAL and TEXACO that supplied LILCO and CON EDISON, and the holdings of MOBIL. By the terms of this decree, 49% of the concession rights would not be disturbed. The oil from the remaining 51% would be offered for sale to the oil companies by the Libyan government. However, the LPG had recently concluded agreements with the Persian Gulf countries granting those governments only a 25% interest in their crude oil concessions; SOCAL, TEXACO, MOBIL and the other "majors" feared that a grant of 51% to Libya, where their interests and holdings were relatively minor, might jeopardize the Persian Gulf agreements, where they had far more vast and more valuable concessions.

Accordingly, after the Libyan action, at an LPG meeting on September 6, 1973, SOCAL's chairman suggested, and MOBIL, TEXACO and the other LPG majors agreed:

> "Not to operate at 49% of normal rate—nor to handle any oil exports on behalf of the Libya Govt."*

Thereafter, pursuant to the conspiracy, SOCAL, MOBIL, TEXACO and the other LPG majors jointly refused to produce or export any Libyan oil. SOCAL withdrew its tankers, which had been used to transport oil to the NEPCO refinery in the Bahamas and, despite its earlier commitment to guarantee supplies of this oil to the utilities, refused to supply any replacement oil from its worldwide resources.

*Quotations attributed to executives of the oil companies are from documents obtained by the utilities in preliminary discovery which were presented to the District Court as exhibits to the affidavit of Asa D. Sokolow, sworn to December 20, 1974.

The LPG members were fully conscious of the nature of their act as a naked restraint of trade, aimed at that market which was most important to its effectiveness. At a prior LPG meeting, at which "negotiating strategy" was discussed, the oil companies determined that if they could not reach a favorable agreement with Libya they would not only refuse to lift Libyan oil but would "close the eastern seaboard of the U. S. to Nat'd [nationalized] oil" and would police the boycott by chasing any so-called "hot oil" with a series of lawsuits to prevent the nationalized oil or any Libyan oil from reaching the Eastern Seaboard.

Hence there can be no doubt that the oil companies knew the effect the boycott would have on LILCO and CON EDISON. Indeed, as the largest consumers of Libyan low sulphur oil, the utilities were the intended and direct victims, whose injury was essential to the success of the boycott. The oil companies were expressly warned that Libyan low sulphur oil was "used primarily to supply low sulphur fuel to CON EDISON OF NEW YORK . . . LONG ISLAND LIGHTING COMPANY . . . and other East Coast utilities." They were further expressly warned that a consequence of the boycott would be "severe power blackouts" and "potentially irrevocable damages" to LILCO and CON EDISON. Nevertheless, the oil companies implemented and enforced the boycott.

Faced with this boycott, NEPCO opened negotiations with the Government of Libya for the direct purchase of reduced quantities of low sulphur oil, partially to replace that oil which SOCAL had, in concert with TEXACO and MOBIL, ceased producing or exporting from its Libyan

concession. However, this oil was offered to NEPCO, and by NEPCO to the utilities, at nearly double the pre-boycott price. LILCO and CON EDISON tried but were unable to obtain low sulphur crude oil from other sources. No LPG member submitted an offer. Therefore, under the compulsion of environmental restrictions precluding their use of high sulphur fuel oil, and to avoid interruptions of service, LILCO and CON EDISON had no choice but to agree to purchase from NEPCO the oil it had obtained from the Government of Libya, which was the only low sulphur oil available.

In furtherance of the boycott, and as planned, SOCAL, TEXACO and MOBIL made every effort to prevent this replacement oil from reaching the utilities. On September 13, 1973, within minutes of each other, NEPCO's executives received threatening telephone calls from executives of SOCAL and TEXACO. These calls were followed by almost identical threatening letters from SOCAL and TEXACO.

When verbal threats failed, SOCAL, TEXACO and MOBIL (although MOBIL did not produce this type of low sulphur oil in Libya) instituted a series of more than 25 lawsuits against NEPCO, chasing its ships around the world in an effort to stop the flow of Libyan low sulphur oil to the utilities. These lawsuits were brought despite the fact, as shown by their own documents, that the oil companies knew that they could not establish any ownership rights to the oil in a court of law. The oil companies, by this course of action, sought to preclude others from purchasing this oil from the Government of Libya or transporting it to the United States.

LILCO and CON EDISON did receive a reduced quantity of oil from NEPCO, avoided the threatened blackouts and brownouts, and paid the greatly increased prices. They brought these actions to recover that cost as well as other damages sustained.

C. The Decisions Below

The oil companies moved to dismiss the complaints in the District Court, purportedly pursuant to Rule 12(b)(6), on the ground that the utilities did not have standing to maintain these actions. The motions were heard after petitioners had been permitted only the most limited of documentary discovery, no interrogatories, and no oral depositions of respondents. One respondent, MOBIL, has not even answered the complaint. In response to the motions, LILCO and CON EDISON submitted a series of documents which proved the averments of the complaints and established by direct documentary evidence that under any test applicable to standing, these utilities were proper plaintiffs because they were the intended victims of the boycott.

However, ignoring the facts alleged in the complaints and refusing to consider the utilities' proffered documents, the District Court dismissed the complaints. 390 F. Supp. 1172 (S. D. N. Y. 1975) (A-17).* It held that the utilities were not in the "target area", and hence did not have standing, because the anti-competitive conduct of the oil companies was "directed at Libya or the Persian Gulf states or all of them" but not LILCO or CON EDISON. 390 F. Supp. at 1176 (A-27).

There was no such allegation in the complaints.

Disregarding all supplementary factual material presented by petitioners, the Court went on to find as fact that LILCO and CON EDISON were not injured by any antitrust violation by the oil companies. The District Court stated that if anyone had a right to sue, it was NEPCO, the only private party wronged by the action of SOCAL. *Id.* (A-26).

The Court of Appeals affirmed, but on somewhat different grounds. It concluded that LILCO and CON

*References to "A-   " are to the Appendix annexed hereto.

EDISON were not in the "target area", since the boycott was aimed primarily at Libya and secondarily at Saudi Arabia. Slip op. at 5728* (A-10).

Again, there was no such allegation in the complaints.

The utilities were found, despite their injuries resulting directly and immediately from the oil companies' acts, to be too "remote" from the antitrust violations and to have no standing to sue. Slip op. at 5729 (A-11). Although it was clear on the face of the complaints, as well as in the supporting documents presented on the motion, that LILCO and CON EDISON suffered damages because they were large consumers of SOCAL's Libyan low sulphur oil, for which there was no substitute available to them at that time, the Court nevertheless held that LILCO and CON EDISON "were not the objects of the alleged antitrust violations" and that "[t]heir injuries were the result of their relationship to NEPCO, an intermediate non-target." *Id.* at 5728 (A-10). Purporting to apply the same "target area" test as the District Court, the Court of Appeals thus determined that even NEPCO, which the District Court had assumed to be a "target" of the antitrust violations, did not have standing to sue.

The Court of Appeals did, however, sustain the Second Claim for Relief of the LILCO Complaint, which the District Court had also dismissed for lack of standing. As to the Second Claim, the Court of Appeals ruled:

> "The second count, in marked contrast to the first, moves the target area of the alleged conspiracy from Saudi Arabia and Libya to the East Coast of the United States. It charges a conspiracy to reduce supply and inflate prices charged to electric utilities. *Clearly LILCO is within the target area of such a conspiracy.*" Slip op. at 5733 (A-15) (emphasis added).

*References to the opinion of the Court of Appeals, not yet reported, are to its slip opinion, annexed in the Appendix hereto.

However, identical allegations were contained in the first claims for relief in both complaints (*see, eg.,* ¶¶ 22, 23, A-39).* Indeed, the documents applicable to both claims speak expressly of closing the Eastern Seaboard of the United States to low sulphur oil. If the utilities have standing to bring the Second Claim, then, on the basis of the Complaints, they must have standing to prosecute the First.

THE REASONS FOR GRANTING THE WRIT

I—THE DISTRICT COURT AND COURT OF APPEALS ON MOTIONS PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE MERITS OF PETITIONERS' ANTITRUST CLAIMS BY DISMISSING THEM FOR LACK OF STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT.

The courts below dismissed these claims on the merits before any significant discovery and even before one defendant had even answered. The excuse offered was "standing"—the result achieved was "summary judgment" —summary judgment without consideration of petitioners' affidavit and based on facts not pleaded in the complaints.

In dismissing the first claims for relief below, both Courts focused on what they deemed to be the motive and intent of the oil companies, but it is firmly established that summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473 (1962). Indeed, as this Court held in *Conley* v. *Gibson,* 355 U. S. 41, 45-6 (1957), "in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that

*For the convenience of the Court, references to "¶ " are to the LILCO complaint annexed in the Appendix hereto as Exhibit C. Almost identical allegations are contained in the CON EDISON complaint, annexed in the Appendix hereto as Exhibit D.

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

It should be apparent that this admonition will apply with even greater force to motions to dismiss addressed to the pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure, but this has not been so, particularly in the standing area. District courts and courts of appeals in many circuits are showing no reluctance under the guise of Rule 12(b)(6) to dismiss complaints summarily—a lack of reluctance that most assuredly would be inappropriate on a motion for summary judgment under Rule 56.*

This increasing use of Rule 12(b)(6) summarily to dismiss antitrust complaints, and particularly the ruling in these cases, clearly "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968). For this reason alone, this Court should grant certiorari and should halt this alarming trend.

**See, e.g., Reibert* v. *Atlantic Richfield Co.*, 471 F. 2d 727 (10th Cir.), *cert. denied*, 411 U. S. 938 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Jeffrey* v. *Southwestern Bell Telephone Co.*, 372 F. Supp. 979 (N. D. Tex. 1974), *aff'd*, 1975-2 Trade Cas. ¶ 60,482 (5th Cir. 1975); *W. T. Grant Co.* v. *Christensen*, 1975-1 Trade Cas. ¶ 60,324 (S. D. N. Y. 1975); *Carroll* v. *Protection Maritime Ins. Co.*, 377 F. Supp. 1294 (D. Mass. 1974) *aff'd in part*, 512 F. 2d 4 (1st Cir. 1975); *Nassau Cty. Ass'n of Ins. Agents* v. *Aetna Life & Cas. Co.*, 361 F. Supp. 967 (S. D. N. Y. 1973), *aff'd*, 497 F. 2d 1151 (2d Cir.), *cert. denied*, 419 U. S. 968 (1974). *Pollack* v. *Balfour Co.*, 1973-2 Trade Cas. ¶ 74,339 (N. D. Ill. 1972); *Contreras* v. *Grower Shipper Vegetable Ass'n*, 1971 Trade Cas. ¶ 73,592 (N. D. Cal. 1971), *aff'd*, 484 F. 2d 1346 (9th Cir. 1973), *cert. denied*, 415 U. S. 932 (1974); *Barr Rubber Products Co.* v. *McNeil Corp., et al.*, 1971 Trade Cas. ¶ 73,678 (N. D. Ohio 1970); *Cosentino* v. *Carver Greenfield Corp.*, 1970 Trade Cas. ¶ 73,390 (D. Neb. 1969), *aff'd in part*, 433 F. 2d 1274 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 276 F. Supp. 373 (S. D. N. Y. 1967), *aff'd*, 407 F. 2d 166 (2nd Cir.), *cert. denied*, 395 U. S. 943 (1969).

Cf., Rule 56 and *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (9th Cir. 1973), *cert. denied*, 415 U. S. 919 (1974).

The utilities consistently have taken the position that it is evident on the face of the complaints that they have standing. However, these are complex cases raising difficult issues of motive, intent and causation. Therefore, to overcome the motions to dismiss, which were supported by an extensive statement of "background facts" including an affidavit with exhibits offered by MOBIL in support of its 12(b)(6) motion, the utilities submitted certain documents obtained from respondents in preliminary discovery. The District Court, in exercise of its "discretion,"* refused to treat respondents' motions as motions for summary judgment—which they clearly were—excluded the proffered documents, purported to limit its inquiry to the face of the complaints themselves, and then effectively rewrote the complaints.

As we shall demonstrate, however, the District Court based its opinion on a number of factual determinations inconsistent with the allegations of the complaints, and on apparent factual misconstructions of the nature of the utilities' claims. Its decision, in effect, on a purported Rule 12(b)(6) motion, granted summary judgment to respondents.

The Second Circuit also refused to consider the proffered documents. It made its own factual findings, formulated its own construction of the complaints and held that the utilities were not and could not as a fact have been "objects" of the conspiracy. Slip op. at 5728 (A-10). It rested its conclusion on two findings of fact: (a) that the

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*Rule 12(b) provides in relevant part:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

conspiracy was "aimed" at others and (b) that injury to the utilities was the result of their relationship to NEPCO, whom it termed "an intermediate non-target," and therefore not a possible plaintiff. *Id.* (A-10-11). Neither of these findings of fact is justified by the wording or allegations of the complaints, or by the documents from the files of respondents submitted on the motion.

A. The Decisions Below Disposed of the Merits of the Claims.

In deciding issues of motive or object and physical causation, at a preliminary stage before full discovery (and before one respondent has even answered), the courts below fell into precisely the logical trap perceived by the Sixth Circuit in *Malamud* v. *Sinclair Oil Corp.*, 1975-2 Trade Cas. ¶ 60,442 (6th Cir. 1975). The Court in *Malamud* observed that the application of target area and direct injury standing tests were eliciting a confusion in the courts "between the determination of a litigant's standing and a decision on the merits of his position." 1975-2 Trade Cas. at 66,949. The result was the imposition of an undue pleading burden on plaintiffs and the improper dismissal of antitrust litigation at its incipiency. *Id.*

> "As we see it, . . . by using either approach *a court is enabled to make a determination on the merits of a claim under the guise of assessing the standing of the claimant.* Under either theory [of standing] *the entire question of directness is one that must be resolved upon some factual showing, but standing is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint.* As a result, a party may make sufficient allegations to demonstrate the necessary standing to sue but fail to prove his case on the merits." *Id.* (emphasis added).

Similarly, the courts below have decided the *merits* of petitioners' claim under the guise of assessing the standing

of the claimants,* and, as pinpointed by *Malamud,* did so on the basis of a summary factual conclusion that the utilities were "remote" parties.

B. The District Court's Findings

The District Court professed to find it "difficult" to discover from the complaints, which it termed "general and conclusory,"** the nature of the antitrust violations alleged. It reluctantly assumed for purposes of the motion that "some kind" of antitrust violations were alleged. 390 F. Supp. at 1175 (A-26). However, although excluding the documents submitted, it proceeded to find as fact that:

(a) the anticompetitive conduct alleged was the rejection by defendants of Libya's 51% participation demand;

(b) no anticompetitive conduct of defendants was directed against plaintiffs;

(c) the business decision by SOCAL after the Libyan nationalization to refuse to deliver oil to NEPCO was a wrong to NEPCO, perhaps, but not to plaintiffs;

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*This is particularly well illustrated by the differing findings with respect to the significance of NEPCO. The District Court viewed NEPCO as a possible plaintiff (A-26). To the Court of Appeals, NEPCO was an "intermediate non-target" (A-10). However, as the Court of Appeals itself recognized in its decision on LILCO's second count, the facts concerning the relationship of NEPCO to LILCO and of LILCO to the respondents could not be resolved on this motion. NEPCO's unique position as a conduit for the respondents, on the one hand, and as their competitor, and perhaps even their co-conspirator, on the other, were matters better left for discovery and proof at trial. Slip op. at 5733 (A-15).

***But see, Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 322-3 (2d Cir. 1957):

> "So many defense lawyers have strongly advocated more particularized pleading in this area of litigation; and recently the judges in the court below have treated it as accepted law that some special pleading—the extent is left unclear—is required in antitrust cases. But it is quite clear that the federal rules contain no special exceptions for antitrust cases."

(d) the "target" of the conspiracy—if there were one —was Libya or the Persian Gulf States or all of them; and

(e) the only cause of injury to the utilities was that Libya raised its price, which did not benefit defendants. *Id.* at 1175-6 (A-26-7).

C. The Court of Appeals' Findings

The Court of Appeals viewed the complaints somewhat differently but with the same effect. Its opinion characterized the thrust of the complaints, "construed in the light most favorable to plaintiffs", as follows:

> ". . . the defendants, *motivated* by their interest in strengthening their position in dealing with Saudi Arabia, *organized a group boycott against* Libyan oil in an effort to dissuade the Libyan government from nationalizing 51% of their oil concessions; that pursuing the boycott of Libyan oil they stopped delivering it to NEPCO; that NEPCO obtained it directly from NOC* at higher prices, and that LILCO and CON EDISON were forced to pay these higher prices." Slip op. at 5726-7 (A-8-9) (emphasis added).

It then concluded, once again after excluding the utilities' documents, that, *under the only construction possible,* Libya, or perhaps Saudi Arabia, was the "target" and that the injuries sustained by LILCO and CON EDISON "were the result of their relationship to NEPCO, an intermediate non-target." *Id.* at 5728 (A-10). Therefore, the utilities were as "remote" from the defendants' boycott as the stockholders, employees, landlords, franchisors and licensors excluded by previous Second Circuit decisions. *Id.* at 5728-9 (A-10-11).

*"NOC" refers to the National Oil Company, owned by the Government of Libya, which engages in the marketing of crude oil on its behalf.

D. The Utilities' Averments

The complaints do not allege that Libya or Saudi Arabia was the target of the conspiracy. On the contrary, the complaints allege that pursuant to an ongoing conspiracy in effect since January, 1971, a boycott was imposed by the oil companies on low sulphur oil destined for LILCO and CON EDISON (¶¶ 22-3, 28, 37, A-39, 41, 44). They refused to lift or export Libyan low sulphur oil, and attempted through threats and through chasing "hot oil," to coerce those who tried to break the boycott and to prevent this oil from reaching LILCO and CON EDISON (¶¶ 34, 38-44, A-43, 45-6). The documents the District Court excluded and the Court of Appeals ignored confirmed these facts and proved the direct relationship of the boycott to LILCO and CON EDISON. They demonstated that the oil companies conspired to impose the boycott, that they discussed closing the Eastern Seaboard to this oil, that they had been expressly warned of the consequences to LILCO and CON EDISON, but that they nevertheless jointly imposed the boycott, and then orchestrated and implemented it through the coordinating body to which they all belonged, the LPG.

There is no doubt that the boycott had the effect of restraining trade in low sulphur oil imported into the East Coast of the United States (¶ 23, A-39). As a result of the boycott, the utilities sustained certain injuries, which are set forth in the complaints (¶¶ 49-54, A-47-9). Petitioners submit that this is the only proper construction of the complaints, and the excluded documents simply reinforce its accuracy. Regardless of what in hindsight respondents may claim their only motive to have been, the fact is that the complaints plead, and the documents confirm, that a specific, expressly considered object of the conspiracy was to injure the utilities.

Moreover, as the Court of Appeals recognized when it found that the group boycott was aimed "secondarily at

Saudi Arabia," there can be multiple conspiracies, multiple targets, and primary and secondary boycotts.* Slip op. at 5728 (A-10). That Libya and Saudi Arabia may have been targets does not exclude the incontestable fact that LILCO and CON EDISON were also targets. At a minimum, this presented an issue of fact as to intent and motive that could not properly have been decided on a Rule 12(b)(6) motion.

Had the Court of Appeals analyzed the facts presented free of target area preconceptions, it would necessarily have determined that the utilities' injuries were anything but "remote" from the antitrust violations alleged, or "speculative" in nature. Contrary to the conclusions of the courts below, the utilities suffered no injury *because of their relationship to* NEPCO. Their injuries clearly resulted because they were the largest consumers of low sulphur oil. Unable to employ a substitute, they were compelled to pay the sharply increased prices demanded in the aftermath of respondents' acts. NEPCO did not suffer any injury which, through its "relationship" to LILCO and CON EDISON, somehow redounded to the utilities' disadvantage. As a cost-plus wholesaler of the Libyan oil, NEPCO, if anything, profited when the price of low sulphur oil rose.

NEPCO is a conduit; it buys oil from the majors, refines it, and resells it at a percentage markup to its customers. The oil companies' documents demonstrated that they explicity recognized NEPCO's middleman function, and knew that sale to NEPCO was in reality a sale to LILCO, CON EDISON, and other East Coast utilities.

Hence, to paraphrase the District Court, 390 F. Supp. at 1176 (A-26), the "result was precisely the same" as if NEPCO played no role whatever in the events from which these claims arose. The concerted shutdown of Libyan

**See, Duplex Printing Co.* v. *Deering,* 254 U. S. 443 (1921).

production and export by the oil companies forced the utilities to obtain the commodity at all costs from whatever source available. The injuries sustained as a result of the actual prices they did have to pay were indisputably the direct and immediate consequence of the alleged antitrust violation. Indeed it should be apparent that the utilities were the *only* parties directly injured by the unlawful acts. A more careful analysis of the facts pleaded then, would have revealed that the description "remote," as applied to the utilities' damages, is entirely inconsistent with the realities of the distribution of Libyan low sulphur oil to the East Coast market. At the very least, there were substantial issues of fact which should not have been resolved on either a Rule 12(b)(6) or Rule 56 motion.

Thus, as Judge Waterman warned dissenting in *Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F. 2d 183, 191 (2d Cir. 1970), *cert. denied,* 401 U. S. 923 (1971), the use by the courts below of:

> "inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained."

E. Erosion of the *Poller* Rule

The substance of the decisions below, therefore, constituted summary judgment for defendants on the *merits* of these claims, and hence they are in sharp conflict with the *Poller* decision. In *Poller* this Court held that "trial by affidavit is no substitute for trial by jury." 368 U. S. at 473. Petitioners in these cases have not even been afforded that remedy; their affidavit and exhibits were ignored.* 390 F. Supp. at 1173 (A-21).

This same erosion of the *Poller* standard through rulings on Rule 12(b)(6) motions is occurring in a significant

**See, Conley* v. *Gibson,* quoted *supra,* p. 11-12.

number of antitrust standing cases (*see,* p. 12, n., *supra*). At the very least, a court confronted with complex antitrust claims, raising difficult issues and involving sharply conflicting factual contentions, should be required to exercise its discretion under Rule 12(b)(6) in favor of considering supplementary factual material. Indeed, this Court has recently held that:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party . . . At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. *If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.*" *Warth* v. *Seldin,* 43 U. S. L. W. 4906, 4909 (June 25, 1975) (emphasis added).

If the *Poller* principle is to be maintained, this Court should now define a standard for decision of Rule 12 motions in antitrust litigation. It has already done so with great effect in regard to Rule 56. It should be obvious, following the logic of *Poller,* that motions to dismiss, prior to any discovery and development of the facts, should be even less favored. The dismissals below, which pose the problem so acutely, present this Court with the opportunity to set forth an essential guideline.

Dismissal at the pleading stage for lack of standing under Rule 12(b)(6) unquestionably dilutes the effectiveness of private enforcement of the antitrust laws. As the *Malamud* Court noted:

> "One method used to limit the applicability of Section 4 has been to employ the standing doctrine as a screening device to deny plaintiffs access to the courts." 1975-2 Trade Cas. at 66,947.

Hence, Justice Black's explanation for the granting of certiorari in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 136 (1968) is equally applicable here.

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari."

For the same compelling reason, this petition should be granted.

II—THE CONFLICT AMONG THE CIRCUITS ON RULES FOR DETERMINING WHO HAS STANDING TO SUE FOR ANTITRUST VIOLATIONS SHOULD BE RESOLVED

There is simply no way to reconcile the dismissals below with the language of Section 4 of the Clayton Act. That section gives the right to maintain an antitrust action to "*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." 15 U. S. C. § 15 (1970) (emphasis added). This broad coverage reflects the desire of Congress to protect "all who are made victims of the forbidden practices." *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 236 (1948). Measured by that standard, under the express statutory mandate, it is clear that these utilities, who suffered injury as a result of a group boycott, should have standing to maintain these actions.

However, the courts of appeals in the different circuits have established a non-uniform series of rules that have operated, in cases like these, to limit severely the access of private antitrust plaintiffs to the courts. The re-

sult has been that whether a private plaintiff will have standing to prosecute an antitrust claim is often determined by the circuit in which the action is brought.

This Court has thus far refused to grant certiorari in any case directly raising this issue. It was argued by the oil companies below that a footnote to this Court's decision in *Hawaii* v. *Standard Oil Co. of California,* 405 U. S. 251, 263 (1972) appears to approve the notion that lower courts may properly impose some limits upon the application of Section 4. However, this Court has never sanctioned the restrictive rule of the Second Circuit or the current lack of consistency among the rules applied by the various circuits, and has never established a definitive standard.

Petitioners respectfully submit that the time has arrived for this Court to resolve the conflict among the circuits and to set down a uniform standard for the determination of when a plaintiff has standing to sue under the antitrust laws within the meaning of the Congressional intent embodied in Section 4.

There are at least three different tests prevalent in the circuits. It is perfectly plain that the outcome in a broad range of cases will differ from circuit to circuit and that even within a particular circuit, these "tests" are not applied with any consistency.

A. The Second Circuit's "Target Area" Test

The Second Circuit, in which these actions were brought, has adopted by a very divided court a so-called "target area" test for determining standing. Under the Second Circuit test:

> "[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the person sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.,* 454 F. 2d 1292, 1295 (2d Cir. 1971), *cert. denied* 406 U. S. 930 (1972).

As construed by the Second Circuit in dismissing petitioners' claims, the "target area" rule denies standing "even [to] parties whose injuries may be both immediate and foreseeable" if that injury is "indirect or incidental, or if their business was not in the target area of the allegedly illegal acts."* Slip op. at 5728 (A-10).

B. The Ninth Circuit's "Target Area" Test

The Ninth Circuit proceeds on a significantly different concept. Although articulating a "target area" test to determine whether a plaintiff has standing, the Ninth Circuit inquires whether the injury to plaintiff was "foreseeable" and whether plaintiff fell within " 'the area which it could reasonably be foreseen would be affected' by the antitrust violation." *Hoopes* v. *Union Oil Co. of Calif.,* 374 F. 2d 480, 485 (9th Cir. 1967). In short, in the Ninth Circuit the inquiry will focus not on whether, in the court's view, a conspiracy was subjectively "aimed" at a particular person, but whether a plaintiff's business was " 'within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry.' " *Karseal*

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*The Second Circuit's restrictive target area rule is seemingly followed by the Third and Tenth Circuits. *Harrison* v. *Paramount Pictures,* 211 F. 2d 405 (3d Cir.), *cert. denied,* 348 U. S. 828 (1954); *Nationwide Auto Appraiser Services* v. *Assoc. of C&S Co.,* 382 F. 2d 925 (10th Cir. 1967).

Corp. v. *Richfield Oil Corp.,* 221 F. 2d 358, 362 (9th Cir. 1955).*

In application, the Second and Ninth Circuits have reached diametrically opposed results in cases with strikingly similar facts. Compare, for instance, the target area analysis of landlords whose rentals decrease when tenants are injured by an antitrust violation in *Hoopes, supra,* and *Calderone, supra,* as well as owners of motion pictures whose income is diminished as a result of block-booking by distributors in *Mulvey* v. *Samuel Goldwyn Productions,* 433 F. 2d 1073 (9th Cir. 1970), *cert. denied,* 402 U. S. 923, (1971) and *Fields Productions, Inc.* v. *United Artists Corp.,* 432 F. 2d 1010 (2d Cir. 1970), *cert. denied,* 401 U. S. 949 (1971). Plaintiffs' injuries in these Ninth Circuit decisions were not held to be "remote", "derivative" or "consequential", but "squarely" within the target area of the alleged violation. In the Second Circuit, however, such plaintiffs were "remote" parties outside the target area of antitrust violations directed elsewhere.

C. The Sixth Circuit's Test

Most recently, however, the Sixth Circuit has rejected both of these tests and has adopted a standard analogous to that used in the area of administrative law in suits challenging governmental actions. *Malamud* v. *Sinclair Oil Corp.,* 1975-2 Trade Cas. ¶ 60,442 (6th Cir. 1975). Recognizing that under the guise of assessing the *standing of the claimant,* the inquiries of the Second and Ninth Circuits have instead been used to make a determination on

*The target area approach adopted by the Ninth Circuit is apparently followed in the Fourth, *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F. 2d 414 (4th Cir.), *cert. denied,* 385 U. S. 934 (1966); the Fifth, *Dailey* v. *Quality School Plan, Inc.,* 380 F. 2d 484 (5th Cir. 1967) (*but see Jeffrey* v. *Southwestern Bell Telephone Co.,* 1975 Trade Cas. ¶ 60,482 (5th Cir. 1975); the Seventh, *Congress Bldg. Corp.* v. *Loew's Inc.,* 246 F. 2d 587 (7th Cir. 1957); and the Eighth, *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.,* 368 F. 2d 679 (8th Cir. 1966).

the *merits of the claim,* the Sixth Circuit now requires only (a) that plaintiff allege that the defendant caused him injury in fact and (b) that plaintiff demonstrate that the interest sought to be protected falls "within the zone of interests to be protected . . . by the statute. . . ." 1975-2 Trade Cas. at 66951. This approach recognizes that although not every person may have access to the courts, the "fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated." Flast* v. *Cohen,* 392 U. S. 83, 99 (1968) (emphasis added); *Malamud, supra,* 1975-2 Trade Cas. at 66949.

D. The Cases at Bar

Plaintiffs with serious antitrust claims should not have to go circuit shopping prior to instituting litigation. It is clear that the utilities' claims would not have been dismissed in either the Ninth or Sixth Circuit, and should not have been dismissed in the Second Circuit.

Under the Ninth Circuit test, it would be beyond dispute that the effect of the boycott on the utilities had to have been reasonably foreseen. Even the opinion of the Second Circuit expressly recognized that "[i]t was foreseeable, certainly that . . . this boycott would have some effect, possibly adverse . . . on the business and property of NEPCO's customers, LILCO and CON EDISON." Slip op. at 5728 (A-10). Respondents knew that the particular low sulphur fuel in question was used primarily to supply these utilities and were warned expressly that the boycott could cause "potentially irreparable damages" to the utilities, including "severe power blackouts" in their service area. Surely the boycott signaled a complete breakdown of competitive conditions in the import of low sulphur oil to the East Coast, which had its most severe effect on the utilities.

In the Sixth Circuit, of course, plaintiffs would have standing because the complaints allege (a) injuries in fact caused by the defendants—the marked increase in the price the utilities had to pay for the only low sulphur oil obtainable after the boycott, and (b) that they were in the zone of interests protected by the Sherman Act—the boycott necessarily had to have greatest effect on two of the largest consumers of low sulphur oil—in fact, they and other East Coast utilities were the *only* parties injured (*see,* p. 19, *supra.*). Moreover, unlike the District Court and Second Circuit, the Sixth Circuit would surely have refrained from making a decision on the merits on the issues the utilities sought to have adjudicated. The Second Circuit *found as fact* that the boycott was "aimed primarily at Libya and secondarily at Saudi Arabia," (Slip op. at 5728, A-10)—a conclusion not based upon the allegations of the complaints—and that under no possible construction of the complaints could the utilities be found to be "objects" of the conspiracy. *Id.* The Sixth Circuit, petitioners submit, would not have reached this result, for it clearly presupposes the outcome on the merits of the issues to be tried. Furthermore, if there were doubts, in resolving them on this motion the Sixth Circuit would surely have taken into account the documents presented by the utilities, which the Second Circuit and the District Court refused to do.

This Court has held time and time again that Sherman Act protection is not confined to any particular class of plaintiffs:

> "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated . . ." *Mandeville Island Farms, supra,* 334 U. S. at 236.

The result in these cases, we submit, is inconsistent with this avowed purpose of the antitrust laws, would not have been reached in at least two (and probably six) other circuits, and should not have been reached below.

Therefore, petitioners respectfully ask this Court to grant a writ of certiorari to end the conflict among the circuits and to set a uniform rule and uniform standards to determine when a clearly injured plaintiff has standing to maintain a private antitrust action.

III—THE SECOND CIRCUIT'S "TARGET AREA" STANDING TEST CONTRADICTS THE SETTLED CONSTRUCTION OF THE ANTITRUST LAWS ESTABLISHED BY THIS COURT.

If this Court grants certiorari, petitioners will ask the Court to reject the Second Circuit rule because it is overly restrictive and subject, as here, to serious misapplication. Although the most serious *per se* antitrust violations have been committed by the oil companies, the result below is that no one has "standing" to sue, except perhaps the Arabs. In short, East Coast utilities and millions of American consumers have been victimized, but, in the name of "standing", that grievance may not be redressed.

Although this Court has refrained to this point from establishing a definitive rule of standing in antitrust suits, it has made clear that the broad reach of the Sherman Act and the Congressional intent behind the private cause of action provided by Section 4 of the Clayton Act require that any test for antitrust standing be liberal in its approach and application.

In *Mandeville Island Farms, supra,* this Court stated:

> *"The statute* [*Sherman Act*] *does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.* Nor does it immunize the outlawed acts because they are done by any of these . . . The Act is *comprehensive* in its terms and coverage, protecting all who are made victims of the forbidden

practices by whomever they may be perpetrated. . ." 334 U. S. at 236 (emphasis added).

Later, in *Radovitch* v. *National Football League*, 352 U. S. 445 (1957), this Court specifically warned against judicial creation of impediments to antitrust plaintiffs that would negate the potency of the private enforcement weapon.

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public . . . *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" 352 U. S. at 453-454 (emphasis added).

See, also, Radiant Burners Inc. v. *People's Gas, Light & Coke Co.*, 364 U. S. 656, 660 (1961).

Of course it is apparent that the policy of Section 4 is contrary to the automatic exclusion of any particular class of plaintiff or to the rigid application of a rule which imposes a pleading burden on plaintiff beyond that contemplated by the Federal Rules. However, it is precisely these contrary policies that the Second Circuit test embodied and the courts below applied.

The standing test formulated and applied by the Second Circuit relies exclusively on a categorization of plaintiffs into "types" which by definition, are "remote" and do not have standing. Thus, the Court of Appeals below held simply that, "The cases recognize that suppliers, stockholders, employees, landlords, franchisors, licensors, and consumers, are too remote for Clayton Act standing." Slip op. at 5728-9 (A-10-11). The contrast between this reasoning and the language of *Mandeville Island Farms*, quoted *supra*, could not be more apparent.

Moreover, the Second Circuit's *a priori* "pigeonhole" methodology has encouraged lower courts to dispose of standing motions without critical analysis of the circumstances from which the claims arise. Thus, in the District Court petitioners were categorized (and their claims discarded) as "customer[s] of a former customer". 390 F. Supp. at 1175 (A-25). Subsequently, the Court of Appeals characterized petitioners as "customers of a non-target".* Slip op. at 5729 (A-11). Neither court undertook to examine the actual relationship between the oil companies' unlawful conduct and the utilities' resultant injury. A standing test which in formulation or in application operates to exclude broad classes of plaintiffs on the basis of adjudications which ignore the factual realities posed by each case is wholly at odds with the policies of the antitrust laws elucidated by Congress and by this Court.**

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*The emphasis of both courts on the presence of the intermediary NEPCO conflicts with this Court's decisions in *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U. S. 251 (1972) and *Perkins* v. *Standard Oil Co. of Calif.*, 395 U. S. 642 (1969), where second tier purchasers were found to have standing under Section 4 of the Clayton Act.

**Prior to the institution of these cases, one commentator wrote:

> "To say that a plaintiff's injury must be 'directly' rather than 'indirectly' or 'incidentally' traceable to the defendant's violation of the antitrust laws serves only to announce a result; it is not a reliable tool by which the result may be reached.
>
> . . . .
>
> Similarly, to say that the plaintiff must be within the 'target area' of the offense is to indulge in an unilluminating metaphor which leaves unanswered how the metes and bounds of the target are to be defined. *To be sure, if the defendant can be shown to have expressly intended to injure the plaintiff, he can properly be said to have aimed at him and thus to have incurred liability.* But what of the multitudinous cases where proof of such specific intent will be lacking?" Handler, *The Shift From Substantive To Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 27 (1971) (emphasis added).

The Second Circuit's amorphous target area test is capable of serious misapplication, as exemplified by the decisions below. Although the Second Circuit has stated that its test requires a "rule of reason" approach to standing, *Calderone, supra*, 454 F. 2d at 1296, in fact that does not occur. Indeed, none of the required exploration of the circumstances surrounding this case in light of the underlying policy considerations took place below. The District Court dismissed upon a 16-line standing "analysis", and the Court of Appeals did not comply with the "rule of reason" dictates of its prior decisions. For if such an approach had been applied below, the courts could not have concluded that the utilities lacked standing.

Assuming that "remote parties with possibly speculative injuries" (Slip op. at 5728, A-10) lack standing under the target area standard, even a cursory review of the facts involved would have revealed to the courts that the utilities were decidedly not remote from the alleged antitrust violations, and their injuries not speculative. The oil companies jointly ceased to export Libyan low sulphur oil. The utilities, required by environmental regulations to burn only such oil, were compelled to pay whatever price necessary to obtain supplies from the only source available. The causation is direct, and the damages hard and calculable.

The "remoteness" concept as a rationale for dismissing petitioners' claim is clearly improper in light of the importance of the utilities to the success of the oil companies' boycott. Petitioners were not merely the foreseeable victims of the oil companies' action, they were necessarily the intended and essential objects of the decision to cease export of Libyan crude oil. The LPG majors were aware that if the utilities, the largest purchasers of Libyan oil, were able to obtain adequate supplies elsewhere, then clearly the LPG action would be ineffective. For the leverage derived from the majors' control over market access, which they hoped to

employ to force a rollback in Libyan participation demands, would thus dissipate. The "hot oil" campaign, consisting of threats and the 25 lawsuits instituted by the oil companies to prevent Libyan low sulphur oil from reaching the East Coast, is unequivocal evidence of the focus of respondents' unlawful acts. A direct object, or "target area" of the conspiracy, was, therefore, the isolation of the East Coast utilities from their normal supply of low sulphur oil.

The conceptual difficulty of treating petitioners as "remote" victims despite these facts was manifested in the confused verbiage with which the Court of Appeals sought to buttress its inconsistent conclusion. The utilities were held ineligible as antitrust plaintiffs because, "Under the rule, even parties whose injuries may be both *immediate* and foreseeable may lack standing to pursue a private remedy *if* that injury is *indirect or incidental* . . ." Slip op. at 5728 (A-10) (emphasis added). Given ordinary definitions, it is hard to conceive of an injury that is concededly "immediate" but nevertheless "indirect or incidental." Such empty phraseology, which was compelled by the anomalous result reached on the facts presented here, must not be allowed to settle as a "rule" of standing, and should be rejected as a basis for dismissing these petitioners' claims.*

The result reached below is particularly inappropriate since none of the possible countervailing policy considerations discussed in *Calderone, supra,* 454 F. 2d at 1295, that might encourage a beleaguered court to ignore Congressional intent and deny "standing," were at all present in the case at bar. Multiple liability and the "floodgates" problem were not potential threats. No other possible "target" has filed a similar claim. NEPCO, a partner

*The inconsistancy inherent in the Court's ruling is emphasized by the Court's reinstatement of LILCO's Second Claim for Relief. It was held that LILCO clearly had standing to pursue the Second Claim, yet the Second Claim incorporated almost all of the allegations of the First (¶ 57, A-50, and *see,* p. 11, *supra*).

heavily in debt to SOCAL, suffered no injury and, if anything, profited from the price increase. Moreover, from the documents adduced below, it appears that NEPCO may have settled any possible claims it may have had against SOCAL. The injury to each of petitioners' subscribers is obviously too small to justify individual litigation, and their standing to sue as a class would be dubious.* Nevertheless, the aggregate out-of-pocket losses of the mass of customers in petitioners' service areas represents a substantial public injury which should be redressed. The utilities are committed to distributing damages recovered in these actions representing increased fuel costs to their subscribers under the supervision of the New York State Public Service Commission to rectify part of this public injury. The Public Service Commission obtained leave and filed a brief *amicus curiae* in support of petitioners' position in the Court of Appeals.

Indeed, it should be apparent that the utilities are the only parties financially in a position to prosecute these actions and vindicate the public interest at stake. If they are denied standing, no one can sue the oil companies for the antitrust violations alleged and substantiated in preliminary discovery. Therefore the misapplication of the Second Circuit's amorphous standing rule not only extinguished the broad collective interest in these proceedings but totally immunized the oil companies from private liability for their acts. Therefore the policy considerations that support the standing rules of Section 4 were clearly undercut, not advanced, by the *per se* responses of the courts below.

A definitive standard under Section 4 is clearly in order. However, petitioners submit that irrespective of the rule

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**See, Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir.), *cert. denied*, 375 U. S. 834 (1963). In addition, the feasibility of a suit on behalf of a class as large as that which would be involved here is highly questionable. *See, Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974).

adopted, except in certain limited and unusual situations, standing determinations should not and cannot be made at the most preliminary stage of litigation. Rather, decisions on standing, particularly in factually complex cases like these, should await fuller development of the facts after opportunity for adequate discovery, and must be grounded on the particular facts of such discovery. Only in this manner will the courts be able to arrive at reasoned conclusions on the essentially factual issue of "remoteness" —based on hard evidence rather than on "inherited decisional labels." Even if the Court should now eschew substantive rule-making, enunciating guidelines as to the exercise of such procedural discretion by the lower courts would go far toward curing the worst consequences of the restrictive standing tests.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition should be granted, and a writ of certiorari issue to the Court of Appeals for the Second Circuit.

November 18, 1975

Respectfully submitted,

Asa D. Sokolow
Attorney for Petitioners
Long Island Lighting Company and Consolidated Edison Company of New York, Inc.
575 Madison Avenue
New York, N. Y. 10022

Of Counsel:

David W. Cohen,
Paul E. Levine,
Rosenman Colin Kaye Petschek
Freund & Emil
575 Madison Avenue
New York, N. Y. 10022

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1118, 1119—September Term, 1974.

(Argued June 18, 1975 Decided August 22, 1975.)

Docket Nos. 75-7177, 75-7178

Long Island Lighting Company,

Appellant,

v.

Standard Oil Company of California, Texaco Inc., Mobil Oil Corporation, Chevron Oil Trading Company and Texaco Overseas Petroleum Company,

Appellees.

Consolidated Edison Company of New York, Inc.,

Appellant,

v.

Standard Oil Company of California, Texaco Inc., Mobil Oil Corporation, Chevron Oil Trading Company and Texaco Overseas Petroleum Company,

Appellees.

Before:

Gibbons,* Gurfein and Meskill,

Circuit Judges.

* United States Circuit Judge for the Third Circuit, sitting by designation.

Exhibit A

Appeal from orders entered by the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* in a consolidated action dismissing plaintiffs' antitrust counts in both complaints pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground, that plaintiffs were not within the "target area" of the defendants' alleged conspiracy involving a group boycott of Libyan oil.

Held, order affirmed as to dismissal of the first count in each complaint, but reversed and remanded for further proceedings with respect to the second count in the LILCO complaint alleging a conspiracy to reduce the supply of oil and to raise the prices charged thereof to electric utilities.

ROSENMAN, COLIN, KAYE, PETSCHECK, FREUND & EMIL
Attorneys for Appellants
New York, New York 10022

ASA D. SOKOLOW
DAVID W. COHEN
CHARLES A. SOBERMAN
PAUL E. LEVINE
Of Counsel.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
New York, New York 10022

MILTON HANDLER
MILTON J. SCHUBIN
DANIEL E. LAZAROFF
Of Counsel.

CHARLES F. KAZLAUSKAS, JR.
New York, New York 10017

Attorneys for Appellee Texaco Inc.

Exhibit A

G. KENNETH HANDLEY
Of Counsel.

LORD, DAY & LORD
New York, New York 10004

GORDON D. SPIVACK
JOHN W. CASTLES, 3d
HARRY G. SKLARSKY
DAVID H. MARKS
CAROLYN T. ELLIS
Of Counsel.

PILLSBURY, MADISON & SUTRO
San Francisco, California 94104
TURNER H. MCBAINE
WALLACE L. KAAPCKE
THOMAS E. HAVEN
Of Counsel.

Attorneys for Appellees Standard Oil Company of California and Chevron Oil Trading Company

DONOVAN, LEISURE, NEWTON & IRVINE
Attorneys for Appellee Mobil Oil Corporation

SANFORD M. LITVACK
JAMES A. MAGEE
BENJAMIN VINAR
Of Counsel.

DEBEVOISE, PLIMPTON, LYONS & GATES
New York, New York 10017
Attorneys for Appellee Texaco Overseas Petroleum Company

ROBERT V. VON MEHREN
IRWIN J. SUGARMAN
Of Counsel.

Exhibit A

Gibbons, *Circuit Judge:*

This is a consolidated appeal by Long Island Lighting Company (LILCO), and Consolidated Edison Company of New York, Inc. (CON EDISON). Both companies were plaintiffs in separate antitrust actions which had been consolidated for trial in the district court. That court granted the defendants' joint motion, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the first and second counts of the LILCO complaint and the first count of the CON EDISON complaint.[1] We affirm the dismissal of the first count in both complaints, but reverse the dismissal of the second count of the LILCO complaint and remand that claim to the district court for further proceedings.

The plaintiffs LILCO and CON EDISON are public utilities that generate and distribute electricity for consumption in the State of New York. The defendants are three integrated petroleum companies and two of their subsidiaries: Standard Oil Company of California (SOCAL) and its wholly-owned subsidiary Chevron Oil Trading Company; Texaco, Inc. (TEXACO) and its wholly-owned subsidiary Texaco Overseas Petroleum Company; and Mobil Oil Corporation (MOBIL).

In order to generate electricity, LILCO and CON EDISON purchase low sulphur residual fuel oil which is produced in the course of refining low sulphur crude oil. Environmental regulations require that utilities burn low sulphur residual fuel oil in most of their fossil fuel generating plants. This case grows out of the very sharp increase in price of that grade of oil beginning late in 1973, and it

1 In each case a state law claim against SOCAL for interference with a contractual relationship remains undisposed of. The district court expressly determined, pursuant to Rule 54(b), Fed. R. Civ. P., that there was no just reason for delaying the entry of final judgments. Thus we have jurisdiction under 28 U.S.C. § 1291.

Exhibit A

presents the issue whether LILCO and CON EDISON may recover damages under § 4 of the Clayton Act, 15 U.S.C. § 15, or obtain injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, by reason of the actions of the defendants alleged in the complaint. The allegations of the first count of each complaint are identical for all purposes relevant to this appeal and will be treated together. The second count of the LILCO complaint requires separate treatment. However, with respect to each count, the question presented is whether a Rule 12(b)(6) motion to dismiss was properly granted.

I. The First Count

In addition to the parties in this action, the complaints refer to activities by the following:

LIBYA—The Libyan Arab Republic, in which are located deposits of low sulphur crude oil.

NOC—The Libyan National Oil Company, an oil corporation owned by the Libyan government.

AMOSEAS—American Overseas Petroleum Limited, a company jointly owned by SOCAL and TEXACO, which in 1973 was engaged in crude oil drilling and producing in Libya at oil concessions granted by that government.

ARAMCO—Arabian American Oil Company, a company jointly owned by SOCAL, TEXACO, MOBIL, Exxon corporation, and the government of Saudi Arabia, engaged in the production, refining and transportation of crude oil produced in Saudi Arabia, a Persian Gulf state.

OPEC—The Organization of Petroleum Exporting Countries, an organization of certain Asian, African and

Exhibit A

Latin American countries, which account for the bulk of the known world crude oil reserves, of which Libya and Saudi Arabia are members.

LPG—The London Policy Group, a group of major oil companies with interests in OPEC countries formed in January 1971 to plan policy with respect to, and to bargain jointly with, the OPEC countries.

NEPCO—New England Petroleum Corporation, one of the largest independent importers, refiners and distributors of petroleum products in the United States.

NEPCO has been LILCO's sole supplier of residual oil requirements since 1960, and a major supplier of CON EDISON since 1967. In 1967 SOCAL entered into a long term supply agreement with NEPCO whereby it agreed to supply NEPCO with substantially all of its share of AMOSEAS' output of low sulphur Libyan crude oil and to deliver it to a refinery in the Bahamas that would be owned 65% by NEPCO and 35% by SOCAL. This long term supply agreement induced LILCO and CON EDISON to enter into long term supply agreements for low sulphur oil with NEPCO, which extend to 1980. The effect of the SOCAL-NEPCO agreement was to make SOCAL's share of AMOSEAS low sulphur oil a major source of low sulphur oil for the East Coast of the United States. By September, 1973, when low sulphur fuel was in extremely short supply, the Libyan source became the only available supply.

However, in August, 1973 the government of Libya had demanded that NOC, its state-owned production company have a 51% interest in the oil companies' rights under their Libyan concession agreements. The Libyan demand became a matter of great concern to the London Policy Group (LPG). The LPG, it will be recalled, had been

Exhibit A

founded in January, 1971 by the defendants and other oil companies to present a common front to OPEC. It was agreed that if an OPEC country nationalized one of LPG's member's interests, the other members would endeavor to make up the losses. This policy of concerted action was put to the test in the face of the Libyan demands. However, a split developed between those LPG members whose primary interests were in the Persian Gulf, the center of major production, and who held only secondary interests in Libya, (the "chiefs"), and those smaller independent companies whose primary interest was in the less substantial Libyan production. The smaller independents decided to acquiesce to the Libyan demands while the "chiefs" refused. The complaints allege in identical language:

> "SOCAL, TEXACO, MOBIL and other major LPG members received similar offers [as had the smaller independents] from the Government of Libya for a 51% participation by NOC in their Libyan interests. In their judgment, however, a grant of a 51% interest in their Libyan holdings would have jeopardized their far more vast and more valuable holdings in the Persian Gulf area, where they had succeeded in negotiating much more favorable agreements, including that with the Government of Saudi Arabia for a 25% participation in ARAMCO. Accordingly, SOCAL, TEXACO, MOBIL and other major LPG members concertedly decided to reject and did reject this proposal of the Libyan Government."
> (LILCO Complaint ¶ 31, Joint App. at 11a-12a; CON EDISON Complaint ¶ 30, Joint App. at 34a-35a).

The Libyan proposal having been rejected by the defendants, that government announced that it would nationalize a 51% interest. Thereupon, to summarize the allega-

tions of the complaint, the defendants organized a group boycott of Libyan oil, refusing to lift Libyan oil, or to transport it to the Bahamas refinery, and attempting to prevent NEPCO from obtaining it.

After the group boycott commenced NEPCO entered into negotiations with NOC for the purchase of the approximate quantity of low sulphur crude oil that SOCAL had previously been supplying, but at substantially higher prices and on less favorable terms. Since SOCAL had withdrawn its tankers pursuant to the alleged group boycott, NEPCO also had to make more costly transportation arrangements. NEPCO notified LILCO and CON EDISON that the replacement oil would be offered at substantially higher prices. LILCO and CON EDISON, unable to obtain low sulphur residual oil from other sources, agreed to purchase the NOC oil refined by NEPCO.[2]

The plaintiff utilities allege that by virtue of a fuel adjustment provision contained in their tariff schedules establishing rates for electric power a portion of these fuel price increases is passed on to their customers, but they also allege that they have incurred increased costs, substantial losses in business from present and potential subscribers to their electric services, and impairment of investor confidence resulting in increased cost of marketing their securities.

Thus, construing the complaint in the light most favorable to the plaintiffs, the first count charges that the defendants, motivated by their interest in strengthening their position in dealing with Saudi Arabia, organized a group boycott against Libyan oil in an effort to dissuade

2 The district court took judicial notice that LILCO has pending in the New York Supreme Court, Nassau County, a suit against NEPCO for breach of contract for failure to deliver at prices within the range established in the long term supply contract.

the Libyan government from nationalizing 51% of their oil concessions; that pursuing the boycott of Libyan oil they stopped delivering it to NEPCO; that NEPCO obtained it directly from NOC at higher prices, and that LILCO and CON EDISON were forced to pay these higher prices.

The district court concluded that those allegations were insufficient to state a claim upon which relief could be granted under §§ 4 & 16 of the Clayton Act. It reached this conclusion for two reasons. First, it held that the allegations of the first count placed the plaintiffs outside the "target area" of defendants' alleged boycott, and hence without standing to bring a private antitrust action pursuant to the Clayton Act.[3] (Joint App. at 173a-74a). Second, it held that the first count did not sufficiently allege an injury to any interest of the plaintiffs protected by the antitrust laws, because there was no causal connection between the defendants' activities and the injuries alleged, and because these electric utilities, being natural monopolies, could not be injured in their competitive position in the electric utility business.[4] (Joint App. at 174a-75a). We affirm on the first ground because we conclude that under this circuit's cases on standing, LILCO and

3 *See Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); *GAF Corp.* v. *Circle Floor Co., Inc.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970); *cert. denied*, 401 U.S. 923 (1971); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.); *cert. denied*, 395 U.S. 943 (1969).

4 For the conclusion that a private plaintiff must allege injury to his competitive position, the district court relied on *GAF Corp.* v. *Circle Floor Co., Inc.*, 463 F.2d 752 (2d Cir. 1972). Our affirmance should not be construed as approving the district court's interpretation of the *GAF* holding, since on the basis on which we decide this case there is no occasion to reach that issue.

CON EDISON were not in the "target area" of the group boycott alleged in the first count.

Recognizing that any antitrust violation may produce ripple effects of injury quite far removed from the immediate target of the violation, this court in the cases listed in note 3 in the margin has held that some practical rules of standing must exclude remote parties with possibly speculative injuries. As the rather frequent dissents and concurrences in those cases indicate, the line between plaintiffs with standing and those who lack it may not in every case seem perfectly plain. But the "target area" standing rule is well-established. The policies which favor it are set forth in detail in Judge Mansfield's opinion in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972), and need not be repeated here. Under the rule even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business was not in the target area of the allegedly illegal acts.

In this case the first count alleges a group boycott aimed primarily at Libya and secondarily at Saudi Arabia. It was foreseeable, certainly, that in the short run this boycott would have some effect, possibly adverse, on the business or property of NEPCO, and on the business and property of NEPCO's customers, LILCO and CON EDISON. But LILCO and CON EDISON were not the objects of the alleged antitrust violation. Their injuries were the result of their relationship to NEPCO, an intermediate non-target. The cases recognize that suppliers[5], stock-

5 *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971).

holders,[6] employees[7], landlords[8], franchisors[9], licensors[10], and consumers[11] are too remote for Clayton Act standing. The instant plaintiffs, customers of a non-target, are at least equally remote. The district court correctly held that LILCO and CON EDISON were too remote from the target area of the allegedly illegal group boycott for Clayton Act standing, and we affirm the dismissal of the first counts on that ground. Since that holding adequately supports the judgment appealed from, it is not necessary to pass upon the district court's alternative ground, or to consider the other defenses tendered by the defendants but not decided by the district court.[12]

LILCO and CON EDISON would have us surmount the standing hurdle by construing the first counts as if they alleged a group boycott directed at them. For this they rely upon the allegation:

> "After notification by NEPCO of its price increase, CON EDISON tried to obtain low sulphur residual oil from other sources. No major member of the LPG

6 *Bookout* v. *Schine Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958).

7 *Westmoreland Asbestos Co.* v. *Johns-Manswille Corp.*, 113 F.2d 114 (2d Cir. 1940) (per curiam), *aff'g,* 30 F. Supp. 389, 391 (S.D. N.Y. 1939).

8 *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 496 U.S. 930 (1972).

9 *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971).

10 *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956).

11 *United Egg Producers* v. *Bauer International Corp.*, 312 F. Supp. 319 (S.D. N.Y. 1970).

12 These include the contention that the price increase was the result of an act of state by Libya (See *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964)), and the contention that only the first purchaser from an antitrust violator may recover under the antitrust laws.

> submitted an offer."[13] (CON EDISON Complaint ¶ 48; Joint App. at 39a).

However, this is not a group boycott allegation. It does not suggest that any defendant was actually asked for low sulphur residual oil, that any defendant actually refused to sell it, or that any action of the defendants with respect to the sale of low surphur residual oil to LILCO or CON EDISON was taken in concert. At no time did the plaintiffs seek leave in the district court to amend their complaints. Nor did they urge upon the district court the contention that the quoted allegation should be read as a charge of a group boycott directed at them. Under these circumstances we decline to consider that theory as a basis for reversing the judgment appealed from.

II. LILCO's Second Count

In disposing of the second count of the LILCO Complaint the district court stated:

> "The decision as to this [first count] claim will necessarily govern as to the second claim of the complaint in the LILCO action . . . ." (Joint App. at 166a).

Thus it made no separate analysis of LILCO's standing to plead the second count. Probably the court's ruling was the result of a somewhat equivocal colloquy which took place at the oral argument on the joint motions held on February 24, 1975. Several motions were pending in addition to the joint Rule 12(b)(6) motion which resulted in the order appealed from. The court asked if counsel had any objection to its consideration of the Rule 12(b)(6)

13 The LILCO allegation is substantially identical. See LILCO Complaint ¶ 48, Joint App. at 16a. See p. 14 *infra*, Part II.

motion first, since it might moot the others. The judge was advised that there was no objection. The court next suggested that the argument be confined to the first count of the LILCO complaint, since

> "the decision on the points raised by the joint motion as to this first claim in the LILCO complaint will necessarily govern *as to the second claim in that same complaint* and as to the first claim in the Con Ed complaint." (Joint App. at 112a) (emphasis supplied).

Counsel for LILCO did not object.

The defendants would have us construe this colloquy as the equivalent of a stipulation by LILCO that the disposition of the first count would control the disposition of the second. Possibly the district court so understood it, although the opinion does not say as much. We think, however, that the record is entirely too equivocal to bind LILCO to a stipulation resulting from its counsel's silence when confronted during the argument of opposing counsel with a suggestion by the court, the full import of which may have escaped counsel's attention. Moreover, the court's statement was at least partially accurate, since the ruling on LILCO's first count would necessarily govern CON EDISON's first count. However, for reasons which we will discuss, the italicized language in the court's statement referring to the "second claim in [the LILCO] complaint" is inaccurate. We have not been referred to any record reference which establishes that LILCO's counsel in the heat of forensic battle in the courtroom was even aware of the significance of the court's misstatement. Thus we do not think LILCO is bound by counsel's acquiescence.

The defendants also urge, however, that the same ruling with respect to LILCO's standing must be made on the second count as well, and that we should therefore affirm

the dismissal of that count even though the district court made no separate analysis of it. There are, however, significant differences between the two counts. The second count repeats the jurisdictional, party, and damage allegations of the first count and also repeats the following allegation:

> "After notification by NEPCO of its price increase, LILCO tried to obtain low sulphur residual oil from other sources. No member of the LPG submitted an offer." (LILCO Complaint ¶ 48; Joint App. at 16a).

It then alleges:

> "Defendants SOCAL, TEXACO and MOBIL, acting individually and in concert with each other and with [others], have monopolized, have attempted to monopolize, and have conspired to monopolize the market in the East Coast of the United States for the production and sale of low sulphur crude oil and all products made therefrom . . . .
>
> * * * * *
>
> Defendants have used this monopoly power to limit the supply of petroleum products available to the consuming public and to fix and maintain the prices for these products at unreasonable and artificially high levels. Although defendants were aware of and knew that increasing environmental concern has led and will lead to the requirement that public utilities use only low sulphur distillate and residual oil in their plants, defendants have kept the supply of such petroleum products down and the price for such products up. They have accomplished this, in part, by choosing not to exploit deposits of low sulphur crude oil and by limiting the capacity to refine high sulphur crude oil into low sulphur petroleum products.

> As a result of the foregoing conspiracy, acts and practices, LILCO has been damaged by having had to pay inflated, artificially high prices for its low sulphur distillate and residual oil requirements. LILCO has no present knowledge of the amount of overcharge that has resulted from such unlawful acts and practices. The facts regarding such overcharge are solely within the knowledge and control of defendants and their co-conspirators. After discovery of those facts, LILCO will amend this complaint to set forth its damages specifically." (LILCO Complaint ¶¶ 58, 61, 62; Joint App. at 19a-21a).

The second count, in marked contrast to the first, moves the target area of the alleged conspiracy from Saudia Arabia and Libya to the East Coast of the United States. It charges a conspiracy to reduce supply and inflate prices charged to electric utilities. Clearly LILCO is within the target area of such a conspiracy.

The defendants would have us hold that NEPCO, not LILCO, is the actual target, and that LILCO still lacks standing. But we are dealing here with a Rule 12(b)(6) motion. The second count does not allege the NEPCO-LILCO relationship. Moreover, it alleges that there are other unnamed conspirators. The first count alleges, and it is apparently undisputed, that SOCAL has a 35% interest in NEPCO's Bahamian refinery. If the conspiracy alleged in the second count actually exists, NEPCO may not be its victim, but rather a member. If that should prove to be the case nothing in the Supreme Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) on which defendants rely, would preclude a § 4 Clayton recovery by NEPCO's customers.

The defendants also suggest that LILCO's second count may run afoul of the "pass through" defense since its fuel

charges are reflected in its rates. Whatever may be left of that defense since *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,*[14] the damage allegations pleaded here, including loss of customers, impairment of financial integrity, and increased cost of marketing its securities, cannot be said as a matter of law to fall within the pass through category.

We hold, then, that it was improper to grant a Rule 12(b)(6) motion dismissing the second count of the LILCO complaint. In so holding we do not suggest that the count may not be disposed of on a motion for summary judgment if its rather conclusory allegations should prove to be entirely groundless.

III. Conclusion

The judgment dismissing the first count of the CON EDISON complaint will be affirmed. The judgment dismissing the first count of the LILCO complaint will be affirmed. The judgment dismissing the second count of the LILCO complaint will be reversed and that count remanded to the district court for further proceedings.

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14 See cases collected in Annot., Liability in Damages for Price-Fixing in Violation of Federal Antitrust Laws as Affected by Plaintiff's Passing Excessive Charges onto His Own Customers, 1 A.L.R.Fed. 500 (1969).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LONG ISLAND LIGHTING COMPANY,
Plaintiff,
—against—
STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants.

74 Civ. 2233

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,
—against—
STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY AND TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants.

74 Civ. 2645

APPEARANCES:

ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL, ESQS.
Attorneys for Plaintiffs
575 Madison Avenue
New York, New York 10022

ASA D. SOKOLOW, ESQ.
DAVID W. COHEN, ESQ.
NAOMI G. LITVIN
JOSEPH LEIBOWITZ, ESQ.
KENNETH F. MCCALLION
CHARLES A. SOBERMAN, ESQ.
KAREN WEINER
Of Counsel

Exhibit B

LORD, DAY & LORD, ESQS.
25 Broadway
New York, New York 10004
Attorneys for defendants Standard Oil Company of California and Chevron Oil Trading Company

GORDON B. SPIVACK, ESQ.
JOHN W. CASTLES, III, ESQ.
HARRY G. SKLARSKY, ESQ.
THOMAS D. BRISLIN, ESQ.
DAVID MARKS, ESQ.
PILLSBURY, MADISON & SUTRO, ESQS.
225 Bush Street
San Francisco, California
TURNER H. MCBAINE, ESQ.
WALLACE L. KAAPCKE, ESQ.
THOMAS E. HAVEN, ESQ.
Of Counsel

CHARLES F. KAZLAUSKAS, JR., ESQ.
135 East 42nd Street
New York, New York 10017

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, ESQS.
425 Park Avenue
New York, New York 10022
Attorneys for defendant Texaco Inc.

G. KENNETH HANDLEY, ESQ.
MILTON J. SCHUBIN, ESQ.
MILTON HANDLER, ESQ.
DANIEL E. LAZAROFF, ESQ.
Of Counsel

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.
30 Rockefeller Plaza
New York, New York 10020
Attorneys for defendant Mobil Oil Corporation

SANFORD M. LITVACK, ESQ.
JAMES A. MAGEE, ESQ.
BENJAMIN VINAR, ESQ.
Of Counsel

Exhibit B

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DEBEVOISE, PLIMPTON, LYONS & GATES, ESQS.
299 Park Avenue
New York, New York 10017
Attorneys for defendant Texaco Overseas Petroleum Company

ROBERT B. VON MEHREN, ESQ.
IRWIN J. SUGARMAN, ESQ.
Of Counsel

Exhibit B

WYATT, District Judge,

This is a motion by all defendants to dismiss the first and second claims of the complaint in the first action (74 Civ. 2233) and the first claim of the complaint in the second action (74 Civ. 2645). Fed. R. Civ. P. 12(b)(6)

These are two separate civil actions, separately commenced. Plaintiff in the first action is Long Island Lighting Company (Lilco). Plaintiff in the second action is Consolidated Edison Company of New York (Con Ed). The five defendants in each action are the same. They are three major oil companies—Standard Oil Company of California (SOCal), Texaco, Inc. (Texaco), and Mobil Oil Corporation (Mobil)—and a subsidiary of SOCal and a subsidiary of Texaco. For simplicity, the two subsidiaries will be disregarded and included in any mention of SOCal and Texaco.

These two actions were consolidated by order filed August 23, 1974. In the federal courts, consolidation does not destroy the separate character of the actions. There may be consolidated discovery procedures and there may be a joint trial of the two actions but each action preserves its separate identity. *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 496-97 (1933); *Zdanok* v. *Glidden Co.,* 327 F. 2d 944, 950 n.6 (2d Cir. 1964); *McAlister* v. *Guterma,* 263 F. 2d 65, 68-69 (2d Cir. 1958); *Greenberg* v. *Giannini,* 140 F. 2d 550 (2d Cir. 1944) (L. Hand, C. J.); *Abrams* v. *Occidental Petroleum Corp.,* 44 F. R. D. 543, 547 (S. D. N. Y. 1968).

On the return day of this motion, there were also two other motions, one by SOCal and the other by Mobil. These two other motions were adjourned without date, to permit the present motion to be heard and decided first, before considering the other two motions.

Exhibit B

The present motion is directed to the complaint in each of the two actions. The questions raised, however, are the same since the complaints in respect of the claims involved are substantially the same. For simplicity, this opinion will consider only the first claim of the complaint in the Lilco action. The decision as to this claim will necessarily govern as to the second claim of the complaint in the Lilco action and as to the first claim of the complaint in the Con Ed action.

The memorandum for movants refers to a few matters outside the complaint, these apparently not the subject of dispute. Lilco, in opposing the three motions, has submitted extensive affidavits. This procedure was probably followed by counsel for Lilco because one set of papers has been submitted by them, opposing all three motions and on one at least of the other motions an affidavit was submitted by the movant. In any event, the decision of the present motion is based solely on the complaint. Affidavits have been excluded and not considered. Fed. R. Civ. P. 12(b)

The First Claim of the Complaint in the Lilco Action (numbers in parentheses refer to paragraph numbers of the complaint)

The claim arises under Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2) and under Sections 4 and 16 of the Clayton Act (15 U. S. C. §§ 15, 26). Jurisdiction is laid under 28 U. S. C. § 1337 and appears to exist.

Lilco is an electric utility serving customers on Long Island (3). It needs each year about 7½ million barrels of low sulphur oil, out of an annual requirement of about 21 million barrels of oil of all types (24).

For some years, New Engand Petroleum Corporation (Nepco) has been the sole supplier of oil to Lilco (25).

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Nepco is one of the largest "independent" importers, refiners, and distributors of oil (14).

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SOCal and Texaco in the early 1960's found in Libya (a sovereign state) a "substantial quantity" of low sulphur crude oil. They produced this crude oil in Libya through a jointly owned corporation (Amoseas). SOCal made a long term agreement with Nepco under which SOCal agreed to supply Nepco with substantially all of the share of SOCal of the output of Amoseas in Libya. This crude oil was to be delivered by SOCal to a refinery in the Bahamas (Borco). Borco was owned 65% by Nepco and 35% by SOCal. The effect of the Nepco-SOCal agreement was to make Libya the major source of low sulphur oil for the East Coast of the United States. (10, 12, 27)

There is an agreement between Nepco and Lilco under which Nepco is obligated until March 31, 1980, to supply Lilco with all its requirements of low sulphur oil. The price to Lilco is determined by reference to a published cargo price per barrel, but the agreement "established certain maximum prices". (25, 26)

The general conclusory averment, meaningless except as supported by fact averments, is that defendants and others have conspired to and have monopolized trade in low sulphur oil to be imported into the East Coast of the United States. "A major objective of the conspiracy was and is to protect the monopoly interests of the defendants and others in the Persian Gulf area." No other objective of the conspiracy is averred. Specifically, there is no claim that injury to Lilco was an objective of the conspiracy. Indeed, there was no competition between Lilco and defendants nor did Lilco buy any oil from defendants. There is an averment that defendants knew that the carrying out of the conspiracy would "materially damage" Lilco. (22)

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The "Organization of Petroleum Exporting Countries" (OPEC) is made up of all major oil producing countries. The "London Policy Group" (LPG) is made up of most free world oil companies, including defendants, and was apparently formed to bargain with OPEC. (16, 28) There are a number of averments as to LPG activity but, while evidence as to this might be admissible if there were a trial, they seem to add nothing to the claims of activity by defendants themselves and for present purposes may be disregarded.

In 1972 defendants reached agreement with a number of Persian Gulf oil exporting countries, including an agreement whereby Saudi Arabia secured a 25% participation in a corporation (Aramco) theretofore owned entirely by defendants and another oil company. Aramco produces crude oil in Saudi Arabia. (11, 29)

In August 1973, a number of smaller oil companies made agreements with Libya under which 51% of the oil produced by them in Libya would belong to Libya, 49% would belong to the companies, and the companies had the right to buy from Libya most or all of its 51% of the oil. (30)

Libya offered the same agreement to defendants but they "concertedly" rejected this offer. The reason was that acceptance would have "jeopardized" the "more valuable holdings" of defendants in the Persian Gulf area. (31) Presumably the reasoning of defendants was that if they agreed with Libya on a 51% participation, then Saudi Arabia and the other Persian Gulf countries would want the same percentage or at least more than the 25% participation which had been negotiated.

The Libyan Government then nationalized a 51% interest in Amoseas, the producer in Libya jointly owned by SOCal and Texaco. (33)

SOCal then suspended all deliveries to Nepco of Libyan crude oil. (34) Nepco protested that this was a breach of contract but SOCal "stood firm", its motive being to protect the Persian Gulf interests. (35)

Nepco then made an agreement with Libya under which Nepco bought from Libya about the same amount of crude oil "that SOCal previously had been supplying". Libya, however, raised the

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price and Nepco was obliged to pay Libya "substantially higher prices" than it had been paying SOCal. (36; it seems clear that these "higher prices" demanded by Libya are the real and only root of any evil ultimately visited upon Lilco)

After Nepco had made its purchase agreement with Libya, the conspirator defendants attempted to prevent Nepco from buying oil from Libya or from hauling, refining and distributing it to Nepco customers, among which was Lilco. Their attempts included threats and the bringing of "groundless legal actions around the world". (37-45)

Nepco defeated all these attempts by defendants and was able to bring the oil from Libya. Nepco therefore "succeeded in . . . supplying its customers, including Lilco." (46)

Because Nepco was paying higher prices to Libya for low sulphur crude oil, Nepco demanded higher prices from Lilco for low sulphur residual oil (left after refining crude). The "price charged Lilco by Nepco for low sulphur residual oil continued to rise precipitously". (47) Lilco tried to get oil elsewhere but no oil company in the London Policy Group "submitted an offer". (48)

Lilco had to pay higher prices to Nepco for its oil requirements and this is the chief injury here alleged. (49) Other items of damage are also alleged. (50-56) As to the

damages from "fuel price increases", Lilco avers that "a portion" of such increases has been passed on by it to its electric customers and that, if Lilco recovers for these increases from defendants, refunds will be made to the customers to the extent the Public Service Commission approves. (55)

As noted before, Lilco had a contract with Nepco which contained price provisions and established maximum prices. Accordingly, Lilco commenced an action for breach of contract against Nepco (the complaint in the action against Nepco bears the same date as the complaint in the case at bar). The action against Nepco was brought in the New York Supreme Court, Nassau County. The complaint avers in substance that the increase by Nepco of its prices to Lilco was in breach of their contract. Damages of $62,000,000 are demanded. The averments of damage in the complaint against Nepco (paragraphs 15-22) are substantially the same as in the complaint at bar (paragraphs 49-54).

There is no averment in the complaint at bar about the commencement of the action against Nepco but, as was recognized at oral argument on this motion, judicial notice thereof may properly be taken since the pleadings in the action against Nepco are "public documents". *Zahn* v. *Transamerica Corp.,* 162 F. 2d 36, 48 fn. 20 (3d Cir. 1947); see also *Coman* v. *Coman,* 492 F. 2d 273, 276 fn. 5 (3d Cir. 1974); McCormick on Evidence (2d ed.) 766.

1.

Plaintiff is not a competitor of defendants nor has it ever bought any of their products. Plaintiff is a customer of a former customer of one of the defendants. This one defendant did at one time have business transactions with its customer Nepco, to which it sold oil; it had no such transactions with plaintiff.

The complaint charges that violations of the antitrust laws by defendants caused injury to plaintiff. The nature of these violations is difficult to discover from the complaint; in this respect the complaint is most general and conclusory. For present purposes, however, it will be assumed that the complaint is sufficient to charge some kind of antitrust violations.

No anti-competitive conduct of defendants, however, was directed against plaintiff. Nothing of this sort is claimed by plaintiff; the most claimed is that defendants knew that plaintiff was a customer of Nepco, was a large user of oil, and could be injured by price increases, along with all other users of oil.

Whatever the motives of defendants, up to the nationalization by Libya in

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September 1973, nothing done by defendants could possibly have affected plaintiff. In this period, the conduct of which plaintiff complains is that defendants concertedly rejected the proposal of Libya for a 51% participation. Libya then took the 51% by force. The result was precisely the same as if defendants had done what the complaint suggests they should have done, namely, agree to give up the 51%.

After the nationalization by Libya, SOCal, in resisting the "takeover", refused to deliver crude oil to Nepco. If this was a wrong to Nepco under its contract with SOCal or otherwise, Nepco had its remedy against SOCal. Certainly the business decision by SOCal was no wrong to plaintiff, which bought no oil from SOCal.

After the nationalization by Libya, the real complaint of plaintiff is that Libya raised the price of oil. If plaintiff is able to recover from Nepco for breach of contract, then plaintiff has sustained no damage. If plaintiff is unable to recover from Nepco, plaintiff asks this Court to require defendants to pay for the oil price increases of Libya. The benefit of these increases went all to Libya; defendants received no part of the increases.

2.

The case at bar appears to be ruled by *Calderone Enter. Corp.* v. *United Artists,* 454 F. 2d 1292 (2d Cir. 1971), cert. denied, 406 U. S. 930 (1972). This Court had dismissed antitrust claims on the face of the complaint (Fed. R. Civ. P. 12(b)(6)) because plaintiff had no standing to sue. The Court of Appeals affirmed, declaring it to be the law of this Circuit that

> ". . . in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued." (454 F. 2d at 1295)

The earlier decisions are collected in *Calderone.*

The complaint shows on its face that if there were a conspiracy to violate the antitrust laws the target was not plaintiff but Libya or the Persian Gulf states or all of them. Plaintiff has no standing to sue.

3.

Assuming that Lilco has standing to sue, the complaint shows that it has not been injured "by reason of" any antitrust violations (15 U. S. C. § 4).

The principle is that in a civil antitrust action the plaintiff "must establish a clear causal connection between the violation alleged and the injuries allegedly suffered". *Molinas* v. *National Basketball Ass'n,* 190 F. Supp. 241,

243 (S. D. N. Y. 1961 I. R. Kaufman, D. J.), quoted with approval in *Salerno* v. *American League,* 429 F. 2d 1003, 1004 (2d Cir. 1970), cert. denied, 400 U. S. 1001 (1971).

The complaint makes it clear that the cause of Lilco's injury (if any) was the increase by Nepco of its prices, an increase which Lilco says was an unjustified breach of contract and for which Lilco is suing. If Nepco's price increase was justified under the contract, then the justification was the increase by Libya of the purchase price to Nepco, an increase which was decided upon by Libya, a sovereign state over which defendants have no control. In any event, therefore, no "causal connection", either "clear" or otherwise, is shown between the claimed violations of defendants and the claimed injuries of Lilco.

The further principle is that damages in a civil antitrust action are allowed "only to those who have suffered some diminution of their ability to com-

[390 F. Supp. 1177]

pete", that is to say, "the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he is or was engaged". *GAF Corp.* v. *Circle Floor,* 463 F. 2d 752, 757, 758 (2d Cir. 1972; emphasis in original), cert. dismissed, 413 U. S. 901 (1973)

There is nothing in the complaint to show that Lilco suffered any competitive disadvantage. No such showing could be made since Lilco does not engage in competition, as its memorandum recognizes (p. 107). It is a regulated monopoly.

The claim that defendants had a monopoly and restrained trade relates to the Persian Gulf area, not to Libya. But there is no claim that anything done in the Persian Gulf area affected Lilco; on the contrary, the memorandum for Lilco seems to recognize that nothing done in the

Persian Gulf area had any effect on Lilco except to supply a motive for the alleged activity in Libya.

4.

The movants have further arguments based on the act of state doctrine (*Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964)) and based on the principle that only the first purchaser from an antitrust violator may recover underthe antitrust laws (*Donson Stores Inc.* v. *American Bakeries Co.,* 58 F. R. D. 481 (S. D. N. Y. 1973). In view of the conclusions reached, these arguments—while substantial—need not be considered.

The motion is granted. There is an express determination that there is no just reason for delay and an express direction (Fed. R. Civ. P. 54(b)) to the Clerk for the entry of separate judgments dismissing the first and second claims of the complaint in the first action (74 Civ. 2233) and the first claim of the complaint in the second action (74 Civ. 2645) for failure to state a claim upon which relief can be granted.

So Ordered.

Dated: New York, New York
February 27, 1975

Inzer B. Wyatt
Inzer B. Wyatt
United States District Judge

EXHIBIT C

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION No.

LONG ISLAND LIGHTING COMPANY,
Plaintiff,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY, TEXACO OVERSEAS PETROLEUM COMPANY and JOHN DOES 1 through 10,
Defendants.

COMPLAINT

Dated: New York, New York
May 22, 1974

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
Attorneys for Plaintiff
575 Madison Avenue
New York, New York 10022
(212) 688-7800

Exhibit C

United States District Court

SOUTHERN DISTRICT OF NEW YORK

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY, TEXACO OVERSEAS PETROLEUM COMPANY and JOHN DOES 1 THROUGH 10,

Defendants.

COMPLAINT

Plaintiff, Long Island Lighting Company (LILCO), by its attorneys Rosenman Colin Kaye Petschek Freund & Emil, for its complaint herein alleges as follows:

JURISDICTION AND VENUE

1. The FIRST and SECOND claims for relief of this complaint, directed against all defendants, are instituted pursuant to Sections 4 and 16 of the Act of Congress of October 15, 1914 (15 U. S. C. §§ 15 and 26 (1970)) commonly known as the Clayton Act, and arise under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. §§ 1 and 2 (1970)), commonly known as the Sherman Act. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1337 (1970). Venue of the action in this Court is proper pursuant to the provisions

of 15 U. S. C. §§ 15 and 22 (1970). Defendants Standard Oil Company of California (SOCAL), Texaco Inc. (TEXACO), Mobil Oil Corporation (MOBIL), Chevron Oil Trading Company and Texaco Overseas Petroleum Company, are each doing business and are found in the Southern District of New York. The acts and practices hereinafter described occurred in and affect commerce among the States and between the United States and foreign nations.

2. Jurisdiction of the THIRD claim for relief brought by LILCO against SOCAL is founded upon diversity of citizenship under the provisions of 28 U. S. C. § 1332 (1970) and on principles of pendent jurisdiction. LILCO is a gas and electric corporation organized and existing under the laws of the State of New York, with its principal place of business at 250 Old Country Road, Mineola, New York. SOCAL is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at the Standard Oil Building, 225 Bush Street, San Francisco, California. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

THE PARTIES

3. At all times hereinafter mentioned, LILCO has been a domestic corporation, duly organized and existing under and by virtue of the Transportation Corporations Law of the State of New York, and has been a gas and electric corporation as defined in subdivisions 11 and 13 of Section 11 of the Public Service Law of the State of New York and as such, generates and distributes electricity for residential, commercial and industrial use in Nassau and Suffolk Counties and in part of Queens County. At all times hereinafter mentioned, LILCO, pursuant to the Public Service Law of the State of New York, has been

subject to the jurisdiction of the Public Service Commission of the State of New York as to practically all of its operations, but particularly with regard to the reasonableness of its rates and charges for providing electric service to its customers.

4. SOCAL is the fifth largest petroleum company and the tenth largest corporation in the United States, with assets in 1973 in excess of $9.0 billion. It reported revenue in 1973 of $8.9 billion and net income of $843.6 million. In the first quarter of 1974 it reported a net income of $293 million on revenue of $3.9 billion. SOCAL is engaged on a world-wide basis in the exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products.

5. Chevron Oil Trading Company is a corporation organized and existing under the laws of the State of Delaware, with an office and place of business at 30 Rockefeller Plaza, New York, New York. It is a wholly owned subsidiary of SOCAL. Hereinafter, unless otherwise stated, reference to SOCAL shall include reference to Chevron Oil Trading Company.

6. TEXACO is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 135 East 42nd Street, New York, New York. TEXACO is the second largest petroleum company and the third largest corporation in the United States, with assets in 1973 in excess of $13.5 billion. It reported revenue in 1973 of $11.4 billion and net income of $1.3 billion. In the first quarter of 1974, it reported net income of $589.4 million on revenues of $4.9 billion. TEXACO is engaged on a world-wide basis in the exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products.

7. Texaco Overseas Petroleum Company is a corporation organized and existing under the laws of the State of Delaware, with an office and place of business at 380 Madison Avenue, New York, New York. It is a wholly owned subsidiary of TEXACO. Hereinafter, unless otherwise stated, reference to TEXACO shall include reference to Texaco Overseas Petroleum Company.

8. MOBIL is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 150 East 42nd Street, New York, New York. MOBIL is the third largest petroleum company and the seventh largest corporation in the United States, with assets in 1973 in excess of $10.6 billion. It reported revenue in 1973 of $12.8 billion and net income of $849.3 million. In the first quarter of 1974 it reported net income of $258.6 million on revenues of $4.4 billion. MOBIL is engaged on a world-wide basis in the exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products.

9. JOHN DOES 1 through 10 are co-conspirators with SOCAL, TEXACO and MOBIL in the acts and practices hereinafter described, whose participation in those events is presently unknown to plaintiffs. As their identity and the nature and extent of their participation become known, this complaint will be amended and they will be added as parties to this action.

DEFINITIONS

10. AMOSEAS—American Overseas Petroleum Limited. AMOSEAS is a company engaged in crude oil drilling and producing in Libya. It is one of a series of companies jointly owned by SOCAL and TEXACO and known

as the "Caltex" group, which group constitutes an integrated organization for the exploration for, and production, transportation, refining and marketing of crude oil and products thereof, and is engaged in such operations in the Middle East, Far East, Africa and Australasia.

11. ARAMCO—Arabian-American Oil Company. ARAMCO is a company engaged in the exploration for and the production, refining and transportation of crude oil within Saudi Arabia, operating under a concession granted by the Government of Saudi Arabia. SOCAL, TEXACO and EXXON Corporation (formerly Standard Oil Company of New Jersey) each owned 30% of ARAMCO and MOBIL owned the remaining 10%. On December 20, 1972 the four partners reached agreement with the Government of Saudi Arabia whereby, effective January 1, 1973, the Government of Saudi Arabia became a 25% owner in ARAMCO and the interests of TEXACO, SOCAL and EXXON were reduced to 22½% each and the interest of MOBIL to 7½%.

12. BORCO—Bahama Oil Refining Company. BORCO is a Bahamian refining company owned 65% by New England Petroleum Corporation and 35% by SOCAL.

13. HOST COUNTRY is a country other than the United States in which an oil producing company operates.

14. NEPCO—New England Petroleum Corporation. NEPCO is a New York corporation with its principal place of business at 825 Third Avenue, New York, New York. NEPCO is one of the largest independent importers, refiners, and distributors of petroleum products in the United States, with revenues in 1973 of $600 million. NEPCO services accounts throughout the East Coast of the United States.

15. NOC—Libyan National Oil Company. NOC is the Libyan government-owned oil corporation. It is engaged in the marketing of oil produced in Libya and belonging to the Government of Libya.

16. OPEC—Organization of Petroleum Exporting Countries. OPEC is an organization of certain Asian, African and Latin American countries, which account for the bulk of the known crude oil reserves in the world. OPEC includes all major Persian Gulf and North African crude oil producing countries, including Libya and Saudi Arabia.

17. PERSIAN GULF area is the geographic area including and surrounding the Persian Gulf. Countries in the area include: Iran, Iraq, Kuwait, Saudi Arabia, Qatar, Bahrain, United Arab Emirates and Oman.

18. CRUDE OIL is unrefined oil. In its crude state oil can contain various percentages of sulphur.

19. DISTILLATE OIL (No. 2) is a product of crude oil refined in such a way as to be suitable for use as a home heating oil. Utilities, including LILCO, use distillate oil for firing relatively small, peak-load gas turbine electric generating units.

20. RESIDUAL OIL (No. 6) is that portion of the crude oil that remains after completion of the refining process, during which various petroleum products are extracted from the crude oil. Residual oil is used by utilities, including LILCO, as fuel in steam turbine electric generating units, which are the large, primary generating units which account for the greatest part of oil burned by utilities.

21. LOW SULPHUR, as used in this complaint, describes crude, distillate or residual oil with sulphur content of 0.3% or less.

FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS

22. Beginning on or before January, 1971, and during all times thereafter, the named defendants and JOHN DOES 1 through 10 have combined and conspired unlawfully to restrain and monopolize trade and commerce, and have in fact unlawfully restrained and monopolized trade and commerce, in low sulphur oil to be imported into the East Coast of the United States. A major objective of the conspiracy was and is to protect the monopoly interests of the defendants and others in the Persian Gulf area. To carry out the conspiracy and to achieve their objectives, the defendants agreed to implement and did implement a campaign and plan of action hereinafter set forth, with full knowledge that the implementation of said plan would materially damage LILCO and jeopardize the supply of electricity to consumers on the East Coast of the United States.

23. Defendants aggressively and coercively carried out such campaign and plan of action by means of the measures hereinafter set forth, among others. All such acts and practices were intended by defendants to be, and were in fact, in furtherance of the aforesaid conspiracy and have had the effect of substantially restraining trade and preventing competition in the importation of low sulphur oil into the East Coast of the United States.

24. LILCO is the sole supplier of electric power to consumers in most of Nassau and Suffolk Counties and the

Rockaway Peninsula section of Queens County in the State of New York. Under applicable environmental regulations, LILCO is required to burn only low sulphur residual and distillate oil in its plants in Queens and Nassau Counties. In its Suffolk County plants LILCO is also required to use certain amounts of low sulphur oil. At the present time, approximately 36% of LILCO's residual and distillate oil requirements (or approximately 7.5 million barrels of a yearly requirement of 21.0 million barrels) are for low sulphur oil. LILCO first began burning low sulphur oil in October, 1969.

25. Since 1960 NEPCO has been LILCO's sole supplier of its residual oil requirements. The agreement currently in force between NEPCO and LILCO extends through a term ending March 31, 1980 and specifically obligates NEPCO to supply all of LILCO's low sulphur residual oil requirements up to a yearly maximum of 30 million barrels. LILCO was induced to enter into that agreement by the express representation of SOCAL's officers to LILCO's officers that SOCAL, NEPCO's primary supplier of low sulphur crude oil, would guarantee an adequate supply of such crude oil for the duration of the agreement. The existence of the agreement was common knowledge in the petroleum industry.

26. Under this agreement, the price LILCO paid NEPCO for the various grades of residual oil supplied by NEPCO was to be determined by reference to the New York Harbor Cargo price per barrel as published by Humble Oil and Refining Company, a subsidi y of EXXON, a partner of SOCAL, TEXACO and MC BIL in ARAMCO. The agreement further established certain maximum prices for the products to be supplied. Payments under the agreement were to be made 30 days after the presen-

tation of an invoice and a certificate of quantity and quality prepared by NEPCO with respect to each sale.

27. As of August, 1973, SOCAL was NEPCO's primary supplier of low sulphur crude oil. In the early 1960's SOCAL and TEXACO—operating through AMOSEAS —had found a substantial quantity of low sulphur crude oil in Libya. In 1967, NEPCO entered into a long-term agreement with SOCAL under which SOCAL agreed to supply NEPCO with substantially all of SOCAL's share of AMOSEAS' output, to be delivered by SOCAL to the BORCO refinery. As part of the agreement, SOCAL received a 35% interest in the BORCO refinery and consented to guaranty a loan taken by NEPCO, which guaranty provided that in the event of a default by NEPCO in repayment of the loan, NEPCO's 65% interest in the BORCO refinery would pass to SOCAL. The effect of this agreement was to make Libya the major source of supply of low sulphur oil for the East Coast of the United States and, as the situation existed in August, 1973, if that supply were to be interrupted, there would be substantial brownouts or blackouts in the East Coast of the United States.

28. In January, 1971, SOCAL, TEXACO, MOBIL and most other free world oil companies with interests in OPEC countries, formed a committee known as the London Policy Group (LPG) to plan policy with respect to and to bargain jointly with the OPEC countries, including Libya. The members of LPG agreed, among other things: (a) that no member of LPG would reach any agreement with an OPEC country without the consent of all LPG members and (b) that if an OPEC country took any action against any LPG member, *e.g.*, nationalization of all or part of its oil reserves in that country, the other members of LPG

would supply oil to that company, at cost, to the extent of its losses resulting from that action.

29. Negotiations with OPEC countries were carried out jointly by LPG members from the time of LPG's formation until early 1972, when the LPG members whose primary interests were in the Persian Gulf (consisting of SOCAL, TEXACO, MOBIL and the other major petroleum companies, known within LPG as the "chiefs") in effect split from the LPG members whose primary interests were in Libya (mostly the smaller "independent" petroleum companies). Thereafter, in an effort to protect their monopoly interests in the Persian Gulf area, a number of the major petroleum company members of LPG reached agreement with a number of the Persian Gulf host countries. Specifically, SOCAL, TEXACO, MOBIL and EXXON negotiated an agreement with the Government of Saudi Arabia whereby the Government acquired a 25% participation in ARAMCO.

30. In August, 1973, a number of the smaller "independent" petroleum companies, which were operating in Libya and which had only insignificant holdings in the Persian Gulf area, reached an agreement with the Government of Libya. Under this agreement, 51% of all crude oil produced by those companies would belong to NOC and 49% of the crude oil produced would belong to the companies. The companies would have the right to buy back from NOC most or all of the remaining 51%. Although these smaller companies were LPG members, the LPG did not approve such agreement.

31. SOCAL, TEXACO, MOBIL and other major LPG members received similar offers from the Government of Libya for a 51% participation by NOC in their Libyan interests. In their judgment, however, a grant of

a 51% interest in their Libyan holdings would have jeopardized their far more vast and more valuable holdings in the Persian Gulf area, where they had succeeded in negotiating much more favorable agreements, including that with the Government of Saudi Arabia for a 25% participation in ARAMCO. Accordingly, SOCAL, TEXACO, MOBIL and other major LPG members concertedly decided to reject and did reject this proposal of the Libyan Government.

32. In August, 1973, NEPCO learned that its Libyan source of supply was threatened by these events. Therefore, in an effort to protect itself and to insure adequate oil supplies for its customers and the East Coast of the United States, NEPCO proposed to SOCAL that NEPCO purchase either SOCAL's 50% interest in AMOSEAS or all of AMOSEAS. SOCAL rejected NEPCO's offer for the reasons stated in paragraph 31, *supra*.

33. On September 1, 1973, Libya announced that it would nationalize a 51% interest of all companies in Libya that had not previously accepted the 51% participation, including AMOSEAS, other Libyan interests of SOCAL and TEXACO, and the Libyan interests of MOBIL.

34. On September 10, 1973, SOCAL informed NEPCO that the Libyan Government had seized 51% of SOCAL's interest in AMOSEAS, that SOCAL was resisting this takeover, and that as of September 1, 1973, all deliveries of Libyan crude oil by SOCAL were suspended.

35. NEPCO immediately replied, stating that SOCAL's position would violate SOCAL's contractual obligations to NEPCO and reminding SOCAL that 49% of the AMOSEAS-produced crude oil still belonged to SOCAL and TEXACO and that most of the remaining 51% was being offered to SOCAL and TEXACO by NOC

on a buy-back arrangement. SOCAL stood firm and refused to honor its contractual commitment. Not only did SOCAL refuse to deliver to NEPCO any Libyan crude oil, it also refused to provide any replacement oil from its other sources. At the same time, SOCAL withdrew its tankers which, under its agreement with NEPCO, were used to carry the Libyan oil from Libya to the BORCO refinery in the Bahamas. These actions, taken in accord with agreements made among certain LPG members, were designed to protect SOCAL's and TEXACO's interests in the Persian Gulf, including their interests in ARAMCO.

36. Upon the invitation of the Government of Libya, NEPCO opened negotiations with NOC for possible direct purchase from NOC of part of NOC's 51% share of AMOSEAS-produced crude oil. Following SOCAL's announced boycott of NEPCO and its refusal to honor its contract with NEPCO, NEPCO entered into an agreement with NOC for purchase in Libya of the approximate quantity of low sulphur crude oil that SOCAL previously had been supplying. NEPCO's agreement with NOC, however, was at substantially higher prices per barrel and on distinctly less favorable terms. In addition, since SOCAL had withdrawn its tankers, NEPCO had to arrange for and bear the greatly increased cost of transporting the oil from Libya to the BORCO refinery.

37. Thereafter, pursuant to an unlawful conspiracy whose object was to protect their monopoly interest in and virtually complete control over all aspects of the production, transportation, refining and marketing of crude oil in the Persian Gulf area, SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, embarked on a course of action designed to prevent NEPCO from dealing with the Libyan Government, from purchasing low sulphur crude oil from

NOC, from transporting such low sulphur crude oil, from refining it and from distributing it to its customers, including LILCO.

38. On or about September 13, 1973, R. G. Weinand, Executive Vice President of NEPCO, received a telephone call from L. W. Folmar, a Vice President of TEXACO and Chairman of the Board of Directors of Texaco Overseas Petroleum Company. Mr. Folmar informed Mr. Weinand that he had heard the NEPCO had put a ship into Libya to lift oil which had been taken from AMOSEAS, that this oil still belonged to TEXACO, and that if NEPCO lifted this oil, TEXACO would pursue all means to prevent its use by NEPCO.

39. Minutes later, D. L. DeBaun, a Vice President of NEPCO received a telephone call from H. A. Navis, a Vice President of SOCAL and an officer of Chevron Oil Trading Company. Using almost the same words as Mr. Folmar, Mr. Navis warned NEPCO not to take any oil from NOC and threatened action to prevent NEPCO from making use of any Libyan oil.

40. On the same day, both TEXACO and SOCAL sent letters to NEPCO restating their position, insisting that the Libyan oil was theirs, and threatening action if NEPCO actually lifted the oil.

41. In spite of the threats by SOCAL and TEXACO, NEPCO did lift the oil which it had purchased from NOC. It was loaded at the instruction of NOC at a terminal in Libya operated by a subsidiary of MOBIL.

42. Thereafter, and pursuant to the conspiracy, SOCAL, TEXACO and MOBIL decided to and did institute

a series of groundless legal actions around the world in an effort to harass NEPCO and to prevent NEPCO from transporting and refining the Libyan oil it had purchased from NOC and from distributing it to its customers, including LILCO.

43. A subsidiary of SOCAL and a subsidiary of TEXACO brought an action in Italy against an Italian refinery which had in its possession certain oil belonging to NEPCO. Although claiming in this action that this "hot oil" was rightfully "its oil", at no time would SOCAL agree to deliver the oil either to NEPCO, as it was obligated to do under its supply agreement with NEPCO, or to any of NEPCO's East Coast customers, including LILCO.

44. MOBIL, a SOCAL and TEXACO partner in ARAMCO but not in AMOSEAS, then brought an action in the Bahamas against a Bahamian subsidiary of NEPCO alleging that the oil NEPCO had purchased from NOC rightfully belonged to MOBIL, notwithstanding the fact that MOBIL did not produce that type of oil in Libya.

45. Concurrently, a third action was brought in the Bahamas by TEXACO against a subsidiary of NEPCO trying to prevent NEPCO from using the oil bought from NOC and lifted in Libya.

46. Despite the efforts of SOCAL, TEXACO and MOBIL, NEPCO succeeded in bring the Libyan oil into the United States and supplying its customers, including LILCO. However, as a result of the actions of SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10,

the cost per barrel of low sulphur crude oil immediately rose from a pre-September 1, 1973, price of $3.60 per barrel delivered to the BORCO refinery in the Bahamas to about $6.80 per barrel, an increase of almost 90%. Thereafter, and as a result of the conspiracy, the price of low sulphur crude oil continued to rise precipitiously.

47. This increase in the direct cost per barrel of low sulphur crude oil and the increase in indirect costs to NEPCO resulting from the foregoing acts by SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, led NEPCO to seek to increase the price that NEPCO charged LILCO for low sulphur residual oil. Two days after SOCAL had announced its intention not to deliver Libyan crude oil to NEPCO, NEPCO informed LILCO that replacement oil, to the extent available, would henceforth be offered at a price increase of $3.20 per barrel of low sulphur residual oil on terms of immediate payment. Thereafter, and as a result of the conspiracy, the price charged LILCO by NEPCO for low sulphur residual oil continued to rise precipitously.

48. After notification by NEPCO of its price increase, LILCO tried to obtain low sulphur residual oil from other sources. No member of the LPG submitted an offer.

49. As a result of the foregoing conspiracy, acts and practices, in the period from September 1, 1973 to date, LILCO has suffered substantial damages in the form of greatly increased costs for its low sulphur residual oil requirements. Such damages are continuing.

50. In addition, as a result of the foregoing conspiracy, acts and practices, NEPCO has demanded that LILCO pay

NEPCO on delivery instead of on 30-day terms as provided in the agreement between LILCO and NEPCO. In the period from September 1, 1973 to date, this has resulted in substantially increased interest costs to LILCO. Such damages are continuing.

51. As a result of the foregoing conspiracy, acts and practices, in the period from September 1, 1973 to date, LILCO has been impaired in its ability to conduct normal transactions within the New York Power Pool and within other regional and inter-regional pools and organizations and has lost substantial revenues therefrom. Such damages are continuing.

52. As a result of the foregoing conspiracy, acts and practices, and the threatened loss of its supplies of residual oil, LILCO has thus far had to expend substantial amounts to prepare for conversion of a portion of its oil burning capability to a coal burning capability and LILCO will have to continue to expend substantial sums.

53. As a result of its increased costs resulting from the foregoing conspiracy, acts and practices, LILCO has suffered substantial losses in business from its present consumers and lost present and potential subscribers to several of its electric services. Such damages are continuing.

54. Finally, as a result of the foregoing conspiracy, acts and practices, LILCO has lost good will in its service area and among its customers. In addition, the confidence of the financial community in LILCO has diminished, making investors reluctant to accept LILCO's securities and thus increasing the cost to LILCO of marketing such securi-

ties and of obtaining other forms of financing necessary for LILCO to maintain its financial integrity. LILCO has suffered substantial damages as a result. Such damages are continuing

55. By virtue of an electric fuel adjustment provision contained in the rate schedule of LILCO and approved by the Public Service Commission of the State of New York, a portion of the fuel price increases referred to in paragraph 49, *supra,* has been borne by LILCO's electric customers. In the event LILCO recovers damages for such increases, such recovery will be refunded to said electric customers in a manner and to the extent approved by the New York Public Service Commission.

56. Unless SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10 are enjoined from continuing in the illegal and conspiratorial acts and practices described above, LILCO will continue to suffer damages in the form of increased costs, it will continue to bear the risk of possible brownouts or blackouts of its service area due to unavailability of low sulphur residual oil and it will continue to experience erosion of its financial integrity and its ability to obtain financing sufficient to enable it to continue to provide adequate service to the public. It is and will be virtually impossible to ascertain or measure in damages the extent and nature of the injury that will be inflicted upon LILCO and its services as a result of the foregoing, an injury for which LILCO has and will have no adequate remedy at law.

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS

57. LILCO repeats and realleges the averments of paragraphs 1, 3 to 48 and 54 to 56 of this complaint.

58. Defendants SOCAL, TEXACO and MOBIL, acting individually and in concert with each other and with JOHN DOES 1 through 10, have monopolized, have attempted to monopolize, and have conspired to monopolize the market in the East Coast of the United States for the production and sale of low sulphur crude oil and all products made therefrom. In furtherance thereof defendants have:

(a) pursued a common course of action designed to secure for themselves and exclude others from access to and ownership of the major sources of supply of crude oil, including low sulphur crude oil;

(b) pursued a common course of action designed to exploit and monopolize among themselves the means of gathering and transporting such crude oil to refineries;

(c) pursued a common course of action designed to retain control among themselves of refinery capacity with the object of limiting the supply and controlling the price of all types of refined petroleum products, including low sulphur distillate and residual oil;

(d) pursued a common course of action designed to maintain control among themselves over the distribution and sale and marketing of all types of refined petroleum products, including low sulphur distillate and residual oil.

59. By means of the foregoing conspiracy, acts and practices, defendants have attempted to achieve and have achieved a monopoly over all phases of the petroleum industry from the exploration for and production of crude oil to the transportation, refining and marketing of crude oil and all petroleum products, including low sulphur distillate and residual oil.

60. In 1972, SOCAL, TEXACO and MOBIL in concert with EXXON, GULF OIL CORPORATION, BRITISH PETROLEUM COMPANY LIMITED and the ROYAL DUTCH SHELL GROUP, the seven major members of LPG and the petroleum industry, individually and through joint ventures and consortia among themselves, controlled 64.2% of crude oil production in the free world. They accounted for 77.1% of all OPEC production, 77.6% of production in the Persian Gulf area and Libya, and approximately 80% of Persian Gulf production.

61. Defendants have used this monopoly power to limit the supply of petroleum products available to the consuming public and to fix and maintain the prices for these products at unreasonable and artificially high levels. Although defendants were aware of and knew that increasing environmental concern has led and will lead to the requirement that public utilities use only low sulphur distillate and residual oil in their plants, defendants have kept the supply of such petroleum products down and the price for such products up. They have accomplished this, in part, by choosing not to exploit deposits of low sulphur crude oil and by limiting the capacity to refine high sulphur crude oil into low sulphur petroleum products.

62. As a result of the foregoing conspiracy, acts and practices, LILCO has been damaged by having had to pay inflated, artificially high prices for its low sulphur distillate and residual oil requirements. LILCO has no present knowledge of the amount of overcharge that has resulted from such unlawful acts and practices. The facts regarding such overcharge are solely within the knowledge and control of defendants and their co-conspirators. After discovery of those facts, LILCO will amend this complaint to set forth its damages specifically.

THIRD CLAIM FOR RELIEF AGAINST SOCAL

63. LILCO repeats and realleges the allegations of paragraphs 1 through 4 and 10 through 56 of this complaint.

64. SOCAL has deliberately refused to supply NEPCO with low sulphur crude oil since September 1, 1973. It has done so intentionally and with knowledge of NEPCO's obligation to LILCO under NEPCO's supply agreement with LILCO. SOCAL did so knowing that unless it met its obligations to NEPCO, NEPCO would be unable to meet LILCO's low sulphur residual oil requirements and that if LILCO were able to secure such low sulphur residual oil, it would be able to do so only at greatly increased cost. By wrongfully, maliciously and wilfully refusing to supply NEPCO with low sulphur crude oil, SOCAL intentionally caused NEPCO to breach its agreement with LILCO and has caused and is causing LILCO damages as set forth in paragraphs 49 through 56, *supra*.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

A. That this Court order, adjudge and decree that defendants have violated Sections 1 and 2 of the Sherman Act as alleged in the FIRST and SECOND claims for relief;

B. That with respect to the FIRST claim for relief, LILCO be awarded judgment for $186,000,000 or three times the damages of $62,000,000 presently known to LILCO, plus three times such other and further damages that LILCO has sustained and will sustain in the future as a result of defendants' unlawful acts and practices, plus the costs of this action including reasonable attorneys' fees;

C. That with respect to the SECOND claim for relief, LILCO shall be awarded judgment for three times the damages it has sustained and will sustain in the future as a result of defendants' unlawful acts and practices, plus the costs of this action including reasonable attorneys' fees;

D. That with respect to the FIRST claim for relief, defendants and each of them, and their subsidiaries and affiliates, be enjoined and restrained from combining, conspiring, obstructing or in any way interfering with or attempting to interfere with the ability of NEPCO and others in purchasing, lifting, transporting, refining and distributing Libyan crude oil;

E. That with respect to the SECOND claim for relief, defendants and each of them and their subsidiaries and affiliates be enjoined and restrained from combining and conspiring or attempting in any way to

Exhibit C

control the supply and price of low sulphur crude, distillate and residual oil and from monopolizing or attempting to monopolize the world-wide market for low sulphur crude, distillate and residual oil;

F. That this Court order, adjudge and decree with respect to the THIRD claim for relief, that SOCAL intentionally and wrongfully caused NEPCO to breach its agreement with LILCO and LILCO shall be awarded judgment for $62,000,000 plus such other and further damages that LILCO has sustained and will sustain in the future as a result of SOCAL's wrongful acts, and punitive damages of an additional $62,000,000 plus the costs of this action;

G. That the Court grant such other relief as may be appropriate.

Dated: New York, New York
May 22, 1974.

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL

By /s/ ASA D. SOKOLOW
ASA D. SOKOLOW
575 Madison Avenue
New York, New York 10022
(212) 688-7800

DEMAND FOR JURY

Pursuant to Rule 38 of the Federal Rules of Civil Procedure plaintiff demands a trial by jury.

EXHIBIT D

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION No.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY, TEXACO OVERSEAS PETROLEUM COMPANY and JOHN DOES 1 through 10,

Defendants.

COMPLAINT

Dated: New York, New York
June 20, 1974

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
Attorneys for Plaintiff
575 Madison Avenue
New York, New York 10022
(212) 688-7800

Exhibit D

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CONSOLIDATED EDISON COMPANY OF NEW Y[illegible]K, INC.,
Plaintiff,

—against—

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY, TEXACO OVERSEAS PETROLEUM COMPANY and JOHN DOES 1 THROUGH 10,
Defendants.

COMPLAINT

Plaintiff, Consolidated Edison Company of New York, Inc. (CON EDISON), by its attorneys Rosenman Colin Kaye Petschek Freund & Emil, for its complaint herein alleges as follows:

JURISDICTION AND VENUE

1. The FIRST claim for relief of this complaint, directed against all defendants, is instituted pursuant to Sections 4 and 16 of the Act of Congress of October 15, 1914 (15 U. S. C. §§ 15 and 26 (1970)) commonly known as the Clayton Act, and arises under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. §§ 1 and 2 (1970)), commonly known as the Sherman Act. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1337 (1970). Venue of the action in this Court is proper pursuant to the provisions of 15 U. S. C. §§ 15 and 22 (1970). Defendants Standard

Oil Company of California (SOCAL), Texaco Inc. (TEXACO), Mobil Oil Corporation (MOBIL), Chevron Oil Trading Company and Texaco Overseas Petroleum Company, are each doing business and are found in the Southern District of New York. The acts and practices hereinafter described occurred in and affect commerce among the States and between the United States and foreign nations.

2. Jurisdiction of the SECOND claim for relief brought by CON EDISON against SOCAL is founded upon diversity of citizenship under the provisions of 28 U. S. C. § 1332 (1970) and on principles of pendent jurisdiction. CON EDISON is a gas, electric and steam corporation organized and existing under the laws of the State of New York, with its principal place of business at 4 Irving Place, New York, New York. SOCAL is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at the Standard Oil Building, 225 Bush Street, San Francisco, California. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

THE PARTIES

3. At all times hereinafter mentioned, CON EDISON has been a domestic corporation, duly organized and existing under and by virtue of the Transportation Corporations Law of the State of New York, and has been a gas, electric and steam corporation as defined in subdivisions 11, 13 and 22 of Section 2 of the Public Service Law of the State of New York and as such, generates and distributes electricity and steam for residential, commercial and industrial use in New York City in the Boroughs of Manhattan, Brooklyn, Bronx and Staten Island and in parts of the Borough of Queens and the County of Westchester. CON EDISON also generates and distributes steam for space heating and

cooling in the Borough of Manhattan. At all times hereinafter mentioned, CON EDISON, pursuant to the Public Service Law of the State of New York, has been subject to the jurisdiction of the Public Service Commission of the State of New York as to practically all of its operations, but particularly with regard to the reasonableness of its rates and charges for providing electric and steam service to its customers.

4. SOCAL is the fifth largest petroleum company and the tenth largest corporation in the United States, with assets in 1973 in excess of $9.0 billion. It reported revenue in 1973 of $8.9 billion and net income of $843.6 million. In the first quarter of 1974 it reported a net income of $293 million on revenue of $3.9 billion. SOCAL is engaged on a world-wide basis in the exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products.

5. Chevron Oil Trading Company is a corporation organized and existing under the laws of the State of Delaware, with an office and place of business at 30 Rockefeller Plaza, New York, New York. It is a wholly owned subsidiary of SOCAL. Hereinafter, unless otherwise stated, reference to SOCAL shall include reference to Chevron Oil Trading Company.

6. TEXACO is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 135 East 42nd Street, New York, New York. TEXACO is the second largest petroleum company and the third largest corporation in the United States, with assets in 1973 in excess of $13.5 billion. It reported revenue in 1973 of $11.8 billion and net income of $1.3 billion. In the first quarter of 1974, it reported net income of $589.4 million on revenues of $4.9 billion. TEXACO is engaged on a world-wide basis in the exploration for, and produc-

tion, transportation, refining, distribution and marketing of petroleum and petroleum products.

7. Texaco Overseas Petroleum Company is a corporation organized and existing under the laws of the State of Delaware, with an office and place of business at 135 East 42nd Street, New York, New York. It is a wholly owned subsidiary of TEXACO. Hereinafter, unless otherwise stated, reference to TEXACO shall include reference to Texaco Overseas Petroleum Company.

8. MOBIL is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 150 East 42nd Street, New York, New York. MOBIL is the third largest petroleum company and the seventh largest corporation in the United States, with assets in 1973 in excess of $10.6 billion. It reported revenue in 1973 of $12.8 billion and net income of $849.3 million. In the first quarter of 1974 it reported net income of $258.6 million on revenues of $4.4 billion. MOBIL is engaged on a world-wide basis in the exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products.

9. JOHN DOES 1 through 10 are co-conspirators with SOCAL, TEXACO and MOBIL in the acts and practices hereinafter described, whose participation in those events is presently unknown to plaintiffs. As their identity and the nature and extent of their participation become known, this complaint will be amended and they will be added as parties to this action.

DEFINITIONS

10. AMOSEAS—American Overseas Petroleum Limited. AMOSEAS is a company engaged in crude oil drilling and producing in Libya. It is one of a series of companies jointly owned by SOCAL and TEXACO and known

as the "Caltex" group, which group constitutes an integrated organization for the exploration for, and production, transportation, refining and marketing of crude oil and products thereof, and is engaged in such operations in the Middle East, Far East, Africa and Australasia.

11. ARAMCO—Arabian-American Oil Company. ARAMCO is a company engaged in the exploration for and the production, refining and transportation of crude oil within Saudi Arabia, operating under a concession granted by the Government of Saudi Arabia. SOCAL, TEXACO and EXXON Corporation (formerly Standard Oil Company of New Jersey) each owned 30% of ARAMCO and MOBIL owned the remaining 10%. On December 20, 1972 the four partners reached agreement with the Government of Saudi Arabia whereby, effective January 1, 1973, the Government of Saudi Arabia became a 25% owner in ARAMCO and the interests of TEXACO, SOCAL and EXXON were reduced to 22½% each and the interest of MOBIL to 7½%.

12. BORCO—Bahamas Oil Refining Company. BORCO is a Bahamian refining company owned 65% by New England Petroleum Corporation and 35% by SOCAL.

13. HOST COUNTRY is a country other than the United States in which an oil producing company operates.

14. NEPCO—New England Petroleum Corporation. NEPCO is a New York corporation with its principal place of business at 825 Third Avenue, New York, New York. NEPCO is one of the largest independent importers, refiners, and distributors of petroleum products in the United States, with revenues in 1973 of $600 million. NEPCO services accounts throughout the East Coast of the United States.

15. NOC—Libyan National Oil Company. NOC is the Libyan government-owned oil corporation. It is engaged in the marketing of oil produced in Libya and belonging to the Government of Libya.

16. OPEC—Organization of Petroleum Exporting Countries. OPEC is an organization of certain Asian, African and Latin American countries, which account for the bulk of the known crude oil reserves in the world. OPEC includes all major Persian Gulf and North African crude oil producing countries, including Libya and Saudi Arabia.

17. PERSIAN GULF area is the geographic area including and surrounding the Persian Gulf. Countries in the area include: Iran, Iraq, Kuwait, Saudi Arabia, Qatar, Bahrain, United Arab Emirates and Oman.

18. CRUDE OIL is unrefined oil. In its crude state oil can contain various percentages of sulphur.

19. RESIDUAL OIL (No. 6) is that portion of the crude oil that remains after completion of the refining process, during which various petroleum products are extracted from the crude oil. Residual oil is used by utilities, including CON EDISON, as fuel in steam turbine electric generating units, which are the large, primary generating units which consume the greatest part of oil burned by utilities. CON EDISON also uses residual oil as fuel in the plants in which it generates steam for sale as steam.

20. LOW SULPHUR, as used in this complaint, describes crude or residual oil with sulphur content of 0.3% or less.

FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS

21. Beginning on or before January, 1971, and during all times thereafter, the named defendants and JOHN DOES 1 through 10 have combined and conspired unlawfully to restrain and monopolize trade and commerce, and have in fact unlawfully restrained and monopolized trade and commerce, in low sulphur oil to be imported into the East Coast of the United States. A major objective of the conspiracy was and is to protect the monopoly interests of the defendants and others in the Persian Gulf area. To carry out the conspiracy and to achieve their objectives, the defendants agreed to implement and did implement a campaign and plan of action hereinafter set forth, with full knowledge that the implementation of said plan would materially damage CON EDISON and jeopardize the supply of electricity to consumers on the East Coast of the United States.

22. Defendants aggressively and coercively carried out such campaign and plan of action by means of the measures hereinafter set forth, among others. All such acts and practices were intended by defendants to be, and were in fact, in furtherance of the aforesaid conspiracy and have had the effect of substantially restraining trade and preventing competition in the importation of low sulphur oil into the East Coast of the United States.

23. CON EDISON is the sole supplier of electric power to consumers in most of New York City and Westchester County in the State of New York. Under applicable environmental regulations, CON EDISON is required to burn only low sulphur oil in its plants in New York City and Westchester County. CON EDISON's annual requirements of low sulphur residual oil total

approximately 50 million barrels. From September 1, 1973 through May 31, 1974, CON EDISON has burned 35.3 million barrels of low sulphur residual oil. of which some 11.6 million barrels have been supplied under contract by NEPCO.

24. NEPCO has been a major supplier of CON EDISON's residual oil requirements since 1963. The agreement that was in force in August, 1973 between NEPCO and CON EDISON extended through a term ending March 31, 1980 and obligated NEPCO to supply CON EDISON with low sulphur residual oil in the amount of approximately 23 million barrels per year. CON EDISON was induced to enter into that agreement by the express representation of SOCAL's officers to CON EDISON's officers that SOCAL, a major supplier of low sulphur crude oil to NEPCO, would support NEPCO and make its exceedingly large crude oil reserves throughout the world available to NEPCO to enable NEPCO to meet its needs. The existence of the agreement was common knowledge in the petroleum industry.

25. Under the agreement, the maximum price CON EDISON paid NEPCO for residual oil was to be determined by reference to the prices for the same type product of Humble Oil and Refining Company (a subsidiary of EXXON, a partner of SOCAL, TEXACO and MOBIL in ARAMCO), Asiatic Petroleum Corporation and Amerada Hess Corporation. Payments under the agreement were to be made on or before the 20th day of the month following the month in which deliveries were made, provided NEPCO's invoices were received on or before the 13th day of such following month.

26. As of August, 1973, SOCAL was NEPCO's primary supplier of low sulphur crude oil. In the early 1960s SOCAL and TEXACO—operating through AMOSEAS

—had found a substantial quantity of low sulphur crude oil in Libya. In 1968, NEPCO entered into a long-term agreement with SOCAL under which SOCAL agreed to supply NEPCO with the major portion of SOCAL's share of AMOSEAS' output, to be delivered by SOCAL to the BORCO refinery. As part of the agreement, SOCAL received a 35% interest in the BORCO refinery and consented to guaranty a loan taken by NEPCO, which guaranty provided that in the event of a default by NEPCO in repayment of the loan, NEPCO's 65% interest in the BORCO refinery would pass to SOCAL. The effect of this agreement was to make Libya a major source of supply of low sulphur oil for the East Coast of the United States and, as the situation existed in August, 1973, if that supply were to be interrupted, there could be substantial brownouts or blackouts in the East Coast of the United States.

27. In January, 1971, SOCAL, TEXACO, MOBIL and most other free world oil companies with interests in OPEC countries, formed a committee known as the London Policy Group (LPG) to plan policy with respect to and to bargain jointly with the OPEC countries, including Libya. The members of LPG agreed, among other things: (a) that no member of LPG would reach any agreement with an OPEC country without the consent of all LPG members and (b) that if an OPEC country took any action against any LPG member, *e.g.*, nationalization of all or part of its oil reserves in that country, the other members of LPG would supply oil to that company, at cost, to the extent of its losses resulting from that action.

28. Negotiations with OPEC countries were carried out jointly by LPG members from the time of LPG's formation until early 1972, when the LPG members whose primary interests were in the Persian Gulf (consisting of

SOCAL, TEXACO, MOBIL and the other major petroleum companies, known within LPG as the "chiefs") in effect split from the LPG members whose primary interests were in Libya (mostly the smaller "independent" petroleum companies). Thereafter, in an effort to protect their monopoly interests in the Persian Gulf area, a number of the major petroleum company members of LPG reached agreement with a number of the Persian Gulf host countries. Specifically, SOCAL, TEXACO, MOBIL and EXXON negotiated an agreement with the Government of Saudi Arabia whereby the Government acquired a 25% participation in ARAMCO.

29. In August, 1973, a number of the smaller "independent" petroleum companies, which were operating in Libya and which had only insignificant holdings in the Persian Gulf area, reached an agreement with the Government of Libya. Under this agreement, 51% of all crude oil produced by those companies would belong to NOC and 49% of the crude oil produced would belong to the companies. The companies would have the right to buy back from NOC most or all of the remaining 51%. Although these smaller companies were LPG members, the LPG did not approve such agreement.

30. SOCAL, TEXACO, MOBIL and other major LPG members also received offers from the Government of Libya for a 51% participation by NOC in their Libyan interests. In their judgment, however, a grant of a 51% interest in their Libyan holdings would have jeopardized their far more vast and more valuable holdings in the Persian Gulf area, where they had succeeded in negotiating much more favorable agreements, including that with the Government of Saudi Arabia for a 25% participation in ARAMCO. Accordingly, SOCAL, TEXACO, MOBIL

and other major LPG members concertedly decided to reject and did reject this proposal of the Libyan Government.

31. In August, 1973, NEPCO learned that its Libyan source of supply was threatened by these events. Therefore, in an effort to protect itself and to insure adequate oil supplies for its customers and the East Coast of the United States, NEPCO proposed to SOCAL that NEPCO purchase either SOCAL's 50% interest in AMOSEAS or all of AMOSEAS. SOCAL rejected NEPCO's offer for the reason stated in paragraph 30, *supra.*

32. On September 1, 1973, Libya announced that it would nationalize a 51% interest of all companies in Libya that had not previously accepted a 51% participation, including AMOSEAS, other Libyan interests of SOCAL and TEXACO, and the Libyan interests of MOBIL.

33. On September 10, 1973, SOCAL informed NEPCO that the Libyan Government had seized 51% of SOCAL's interest in AMOSEAS, that SOCAL was resisting this takeover, and that as of September 1, 1973, all deliveries of Libyan crude oil by SOCAL were suspended.

34. NEPCO immediately replied, stating that SOCAL's position would violate SOCAL's contractual obligations to NEPCO and reminding SOCAL that 49% of the AMOSEAS-produced crude oil still belonged to SOCAL and TEXACO and that most of the remaining 51% was being offered to SOCAL and TEXACO by NOC on a buy-back arrangement. SOCAL stood firm and refused to honor its contractual commitment. Not only did SOCAL refuse to deliver to NEPCO any Libyan crude oil, it also refused to provide any replacement oil from its other sources. At the same time, SOCAL withdrew its tankers which,

under its agreement with NEPCO, were used to carry the Libyan oil from Libya to the BORCO refinery in the Bahamas. These actions, taken in accord with agreements made among certain LPG members, were designed to protect SOCAL's and TEXACO's interests in the Persian Gulf, including their interests in ARAMCO.

35. Upon the invitation of the Government of Libya, NEPCO opened negotiations with NOC for possible direct purchase from NOC of part of NOC's 51% share of AMOSEAS-produced crude oil. Following SOCAL's announced boycott of NEPCO and its refusal to honor its contract with NEPCO, NEPCO entered into an agreement with NOC for purchase in Libya of the approximate quantity of low sulphur crude oil that SOCAL previously had been supplying. NEPCO's agreement with NOC, however, was at substantially higher prices per barrel and on distinctly less favorable terms than NEPCO's agreement with SOCAL. In addition, since SOCAL had withdrawn its tankers, NEPCO had to arrange for and bear the greatly increased cost of transporting the oil from Libya to the BORCO refinery.

36. Thereafter, pursuant to an unlawful conspiracy whose object was to protect their monopoly interest in and virtually complete control over all aspects of the production, transportation, refining and marketing of crude oil in the Persian Gulf area, SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, embarked on a course of action designed to prevent NEPCO from dealing with the Libyan Government, from purchasing low sulphur crude oil from NOC, from transporting such low sulphur crude oil, from refining it and from distributing it to its customers, including CON EDISON.

37. On or about September 13, 1973, R. G. Weinand, Executive Vice President of NEPCO, received a telephone call from L. W. Folmar, a Vice President of TEXACO and Chairman of the Board of Directors of Texaco Overseas Petroleum Company. Mr. Folmar informed Mr. Weinand that he had heard that NEPCO had put a ship into Libya to lift oil which had been taken from AMOSEAS, that this oil still belonged to TEXACO, and that if NEPCO lifted this oil, TEXACO would pursue all means to prevent its use by NEPCO.

38. Minutes later, D. L. DeBaun, a Vice President of NEPCO, received a telephone call from H. A. Navis, a Vice President of SOCAL and an officer of Chevron Oil Trading Company. Using almost the same words as Mr. Folmar, Mr. Navis warned NEPCO not to take any oil from NOC and threatened action to prevent NEPCO from making use of any Libyan oil.

39. On the same day, both TEXACO and SOCAL sent letters to NEPCO restating their position, insisting that the Libyan oil was theirs, and threatening action if NEPCO actually lifted the oil.

40. In spite of the threats by SOCAL and TEXACO, NEPCO did lift the oil which it had purchased from NOC. It was loaded at the instruction of NOC at a terminal in Libya operated by a subsidiary of MOBIL.

41. Thereafter, and pursuant to the conspiracy, SOCAL, TEXACO and MOBIL decided to and did institute a series of groundless legal actions around the world in an effort to harass NEPCO and to prevent NEPCO from transporting and refining the Libyan oil it had purchased from NOC and from distributing it to its customers, including CON EDISON.

42. A subsidiary of SOCAL and a subsidiary of TEXACO brought an action in Italy against an Italian refinery which had in its possession certain oil belonging to NEPCO. Although claiming in this action that this "hot oil" was rightfully "its oil", at no time would SOCAL agree to deliver the oil either to NEPCO, as it was obligated to do under its supply agreement with NEPCO, or to any of NEPCO's East Coast customers, including CON EDISON.

43. MOBIL, a SOCAL and TEXACO partner in ARAMCO but not in AMOSEAS, then brought an action in the Bahamas against a Bahamian subsidiary of NEPCO alleging that the oil NEPCO had purchased from NOC rightfully belonged to MOBIL, notwithstanding the fact that MOBIL did not produce that type of oil in Libya.

44. Concurrently, a third action was brought in the Bahamas by TEXACO against a subsidiary of NEPCO trying to prevent NEPCO from using the oil bought from NOC and lifted in Libya.

45. As a result of the foregoing conspiracy, acts and practices of SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, NEPCO was unable to meet its full obligations to CON EDISON to deliver low sulphur residual oil. As a result, CON EDISON was required to purchase substantial amounts of low sulphur residual oil from other suppliers at prices substantially higher than those provided for in CON EDISON's agreement with NEPCO.

46. As a further result of the actions of SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, the cost to NEPCO of Libyan low sulphur crude oil immediately rose from a pre-September 1, 1973, price of \$3.60 per barrel delivered to the BORCO refinery in the Bahamas to

\$6.80 per barrel, an increase of almost 90%. Thereafter, and as a result of the conspiracy, the price of low sulphur crude oil continued to rise precipitously.

47. This increase in the direct cost per barrel of low sulphur crude oil and the increase in indirect costs to NEPCO resulting from the foregoing acts by SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10, led NEPCO to seek to increase the price that NEPCO charged CON EDISON for those amounts of low sulphur residual oil which it was still able to supply to CON EDISON. Two days after SOCAL had announced its intention not to deliver Libyan crude oil to NEPCO, NEPCO informed CON EDISON that replacement oil, to the extent available, would henceforth be offered at a price increase of up to \$3.20 per barrel of low sulphur residual oil on terms of payment five days after delivery. Thereafter, and as a result of the conspiracy, the price charged CON EDISON by NEPCO for low sulphur residual oil continued to rise precipitously.

48. After notification by NEPCO of its price increase, CON EDISON tried to obtain low sulphur residual oil from other sources. No major member of the LPG submitted an offer.

49. As a result of the foregoing conspiracy, acts and practices, in the period from September 1, 1973 to date, CON EDISON has suffered damages in the amount of fifty million dollars (\$50,000,000) as a result of greatly increased costs for its low sulphur residual oil requirements. Such damages are continuing.

50. In addition, as a result of the foregoing conspiracy, acts and practices, NEPCO has demanded that CON EDISON pay NEPCO within five days after delivery instead of as provided in the agreement between CON

EDISON and NEPCO. In the period from September 1, 1973 to date, this has resulted in damages of one million four hundred thousand dollars ($1,400,000) in the form of increased interest costs to CON EDISON. Such damages are continuing.

51. As a result of the foregoing conspiracy, acts and practices, and the threatened loss of its supplies of residual oil, CON EDISON has thus far had to expend six hundred thousand dollars ($600,000) to prepare for conversion of a portion of its oil burning capability to a coal burning capability.

52. Finally, as a result of the foregoing conspiracy, acts and practices, CON EDISON has lost good will in its service area and among its customers; CON EDISON has been forced to omit its dividend for the second quarter of 1974, the first such dividend it has omitted since 1885; the confidence of the financial community in CON EDISON has diminished, making investors reluctant or unwilling to accept CON EDISON securities, forcing CON EDISON to postpone a scheduled issue of common stock planned for offering in May 1974, and increasing the cost to CON EDISON of marketing such securities and of obtaining other forms of financing necessary for CON EDISON to maintain its financial integrity. Damages to CON EDISON as a result of the foregoing are substantial and are continuing and their amount cannot be measured or quantified at this point. When such damages are susceptible of measurement, CON EDISON will amend this complaint to set forth such damages specifically.

53. By virtue of electric fuel adjustment provisions contained in the rate schedules of CON EDISON and approved by the Public Service Commission of the State of

New York, a portion of the fuel price increases referred to in paragraph 49, *supra*, has been borne by CON EDISON's electric and steam customers. In the event CON EDISON recovers damages for such increases, a similar portion of such recovery will be refunded to said electric and steam customers in a manner and to the extent approved by the New York Public Service Commission.

54. Unless SOCAL, TEXACO, MOBIL and JOHN DOES 1 through 10 are enjoined from continuing in the illegal and conspiratorial acts and practices described above, CON EDISON will continue to suffer damages in the form of increased costs, it will continue to bear the risk of possible brownouts or blackouts of its service area due to unavailability of low sulphur residual oil and it will continue to experience erosion of its financial integrity and its ability to obtain financing sufficient to enable it to continue to provide adequate service to the public. It is and will be virtually impossible to ascertain or measure in damages the extent and nature of the injury that will be inflicted upon CON EDISON and its services as a result of the foregoing, an injury for which CON EDISON has and will have no adequate remedy at law.

SECOND CLAIM FOR RELIEF AGAINST SOCAL

55. CON EDISON repeats and realleges the allegations of paragraphs 1 through 4 and 10 through 54 of this complaint.

56. SOCAL has deliberately refused to supply NEPCO with low sulphur crude oil since September 1, 1973. It has done so intentionally and with knowledge of NEPCO's obligation to CON EDISON under NEPCO's supply agreement with CON EDISON. SOCAL did so knowing that

unless it met its obligations to NEPCO, NEPCO would be unable to meet CON EDISON's low sulphur residual oil requirements and that if CON EDISON were able to secure such low sulphur residual oil, it would be able to do so only at greatly increased cost. By wrongfully, maliciously and wilfully refusing to supply NEPCO with low sulphur crude oil, SOCAL intentionally caused NEPCO to be unable to perform under its agreement with CON EDISON and has caused and is causing CON EDISON damages as set forth in paragraphs 49 through 52 and 54, *supra.*

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

A. That this Court order, adjudge and decree that defendants have violated Sections 1 and 2 of the Sherman Act as alleged in the FIRST claim for relief;

B. That with respect to the FIRST claim for relief, CON EDISON be awarded judgment for $156,000,000 or three times the $52,000,000 damages presently known to CON EDISON, plus three times such other and further damages that CON EDISON has sustained and will sustain in the future as a result of defendants' unlawful acts and practices, plus the costs of this action including reasonable attorneys' fees;

C. That with respect to the FIRST claim for relief, defendants and each of them, and their subsidiaries and affiliates, be enjoined and restrained from combining, conspiring, obstructing or in any way interfering with or attempting to interfere with the ability of NEPCO and others in purchasing, lifting, transporting, refining and distributing Libyan crude oil;

D. That this Court order, adjudge and decree with respect to the SECOND claim for relief, that SOCAL intentionally and wrongfully caused NEPCO to be unable to perform under its agreement with CON EDISON and CON EDISON shall be awarded judgment for $52,000,000 plus such other and further damages that CON EDISON has sustained and will sustain in the future as a result of SOCAL's wrongful acts, and punitive damages of an additional $52,000,000 plus the costs of this action;

E. That the Court grant such other relief as may be appropriate.

Dated: New York, New York
June 20, 1974

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL

By ....
Asa D. Sokolow
575 Madison Avenue
New York, New York 10022
(212) 688-7800

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure plaintiff demands a trial by jury.

By ....
Asa D. Sokolow

EXHIBIT E

Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2 provide in relevant part:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . .
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor. . ."

Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26 provide in relevant part:

> "SEC. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . .
>
> SEC. 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . ."

EXHIBIT F

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> "(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Federal Rule of Civil Procedure 56 provides in relevant part:

> "(b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."